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81-5324

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No.

UNITED STATES OF AMERICA ex rel. THOMAS RILEY,

Petitioner,

vs.

GAYLE FRANZEN, Director, Illinois Department of Corrections, and LOU V. BREWER, Warden, Stateville Correctional Center,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does a 16 year old juvenile who requests to see his parent during custodial interrogation, as a means of obtaining the services of an attorney, thereby invoke his constitutional right to counsel and silence under the Fifth Amendment?

2. Is the confession of Thomas Riley --- a 16 year old juvenile with an IQ of 57, an 8th grade education, and no significant prior contact with the police --- voluntary where the shocking facts of the case establish beyond a reasonable doubt that immediately upon his arrest for murder he was returned to the scene of the triple homicide, where he viewed the body of one victim and was subjected to an illegal identification procedure; strip searched at the jail upon arrival; manacled to the bars of his cell for two hours clad in underwear, socks, and a blanket; interrogated for an additional three hours dressed in the same manner; refused by the police to see his father who was in the police station; and was urged by his adult brother who had also been arrested on these charges to take the "weight" for the two because he was a juvenile?

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INTRODUCTION

TO THE CHIEF JUSTICE OF THE UNITED STATES AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

May It Please The Court:

Thomas Riley respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW AND THE MANNER IN WHICH THE FEDERAL CONSTITUTIONAL CLAIMS WERE RAISED

The historical development of the case is adequately set forth in the opinion of the Seventh Circuit. (Appendix A, pages 2-3)

After a jury trial in the Circuit Court of Cook County, Illinois, Thomas Riley was convicted of two counts of murder and one count of involuntary manslaughter. He was sentenced to two concurrent terms of imprisonment of 75 to 225 years for the murder counts and to a term of imprisonment of 3 to 10 years for the involuntary manslaughter count, concurrent with the murder sentence. Prior to trial, Riley unsuc-

cessfully moved to suppress his confession.

His conviction was affirmed by the Illinois Appellate Court, People v. Riley, 49 Ill. App. 3d 304, 364 N.E. 2d 306 (1st Dist., 1977). That court also rejected Riley's challenges to the admissibility of his confession. The Illinois Supreme Court denied leave to appeal, and with Justices Brennan and Marshall dissenting, the Supreme Court denied certiorari. Riley v. Illinois, 435 U.S. 1000 (1978).

Having exhausted his available state court remedies, Riley filed a petition for a writ of habeas corpus in the District Court urging as grounds for relief the two arguments presented here. In an unpublished decision, the District Court denied the petition without a hearing. United States ex rel. Riley v. Franzen, 79-C-1681 (N.D. Ill., August 16, 1979) (McMillen, J.). The United States Court of Appeals for the Seventh Circuit remanded with instructions to conduct an evidentiary hearing. After the resultant evidentiary hearing, Judge McMillen made extensive findings of fact and again denied habeas relief. United States ex rel. Riley v. Franzen, 79-C-1681 (N.D. Ill., October 7, 1980) (Unpublished Memorandum).

On July 10, 1981 the United States Court of Appeals for the Seventh Circuit affirmed. United States ex rel. Riley v. Franzen, 80-2588. The opinion is not yet published.

STATEMENT OF JURISDICTION

(i) The petition is timely filed within 60 days of the July 10, 1981 Seventh Circuit opinion.

(ii) There has been no petition for rehearing in the United States Court of Appeals or request for an extension of time within which to file this petition.

(iii) Jurisdiction is conferred by Title 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the

Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The essential facts are no longer in dispute. The most accurate account of the facts is reported in the opinion of the Seventh Circuit, Riley v. Franzen, 80-2588 (July 10, 1981) hereinafter referred to as Appendix A (Appendix A, page ___).

Those facts which were omitted in the opinion are included with appropriate citations, as follows: The unreported decision of the District Court, Riley v. Franzen, 79-C-1681 (October 7, 1980), is referred to as Appendix B (Appendix B, page ___); the Stipulations of Facts filed in the District Court as part of the Pre-Hearing Compliance are referred to as Appendix C (Appendix C, page ___, #__); the transcript of the evidentiary hearing held in the District Court is referred to as Transcript (Witness' name, Transcript, page ___); and the abstract of state trial report of proceedings is designated as Abstract (A. ___).

At approximately 5:15 p.m. on February 27, 1974, shortly after the shooting deaths of three young men at the Burr Oak Cemetery in Alsip, Illinois were reported to the police, Thomas Riley, then age 16, and his brother Ernest, then eighteen years old, were arrested in connection with the homicides as they hitched a ride in the vicinity of the cemetery. The brothers initially were stopped by Officers Pennix and Moore of the Robbins Police Department. (Appendix

A, page 3) Officer Pennix contacted the Alsip Police Department, which sent a patrol car driven by Alsip Police Officer Scaglione. Alsip Police Sergeant Rice also was present at the time.

Officer Scaglione drove the two brothers to the Burr Oak Cemetery. According to Thomas Riley, the drive took approximately five or ten minutes, during which Officer Scaglione neither advised the brothers of their Miranda rights nor questioned them. There were many police officers and police vehicles at the cemetery upon the brothers' arrival there. Officer Scaglione parked the squad car approximately seventy-five feet inside of the cemetery gate. There the brothers sat inside of the squad car for approximately twenty minutes. (Appendix A, page 4)

At the cemetery the body of one of the homicide victims, covered by a blanket, was lying in Thomas Riley's view. He knew what was there but no coercive reference was made to it by the police. Two young boys who had originally told the police where the suspects had fled were brought to the police car, but they were not able to identify the petitioner or his brother. The petitioner's father and stepmother had been brought to the cemetery but were not allowed any contact with him. Riley was not interrogated at the cemetery. He did not make any statements while there. (Appendix A, page 5)

Thomas Riley and his brother were driven from the cemetery separately. As Thomas Riley left the cemetery he was given Miranda warnings by a plainclothes police officer. Riley testified that at the cemetery he was "scared" and "nervous". He also acknowledged that he understood the warnings when they were read to him. (Appendix A, pages 5-6)

Riley arrived at the Alsip police station at approximately 6:00 p.m. (Appendix A, page 6) He was then strip searched. (Scaglione, Transcript, page 97) His clothes were taken for the purpose of a laboratory examination. He was permitted to put on his underclothes and socks. He was given a blanket which he wrapped around his waist. He was put in a cell next to his brother Ernest, and when they began conversing between themselves, a police officer handcuffed one hand of each boy to his respective bunk. This restraint was removed at

or shortly after 8:00 p.m. (Appendix A, page 6)

During this initial two hour period in the police station Riley overheard the father of one of the victims accost his brother verbally. Also Riley's brother Ernest, an adult, had told him that since Thomas Riley was a juvenile, he should take the "weight" if any charges were made. Ernest Riley, Sr., Thomas' father, arrived at the police station at approximately 7:30 p.m. (Appendix A, page 6), at the suggestion of Attorney Harry Levi. Earlier that evening, Ernest Riley, Sr. had called his attorney, Mr. Levi, and asked for his assistance in regard to his sons' problem. Levi informed him that he was not a criminal lawyer but suggested that Riley Sr. obtain the help of another attorney and that he (Riley) should go to the Alsip police station. (Appendix C, page 5, #23)

At approximately 8:00 p.m. Thomas Riley's handcuffs were removed and he was given Miranda warnings. Riley replied that the warnings had been given twice previously. At this time, the interrogation of Riley was limited to questions concerning his age. (Appendix A, page 7) Thomas Riley first gave his age as 17, but he then told Sergeant Reed that he was 8 days short of 17. (Appendix B, page 5; Appendix A, page 6, footnote 9) The police attempted to verify Thomas Riley's age. His parents incorrectly told the police that he was 17 years old. (Appendix A, page 7)

Without readministering Miranda warnings, Sergeant Reed again spoke with Thomas Riley in his cell at approximately 8:30 p.m. Sergeant Reed told Riley that he would be prosecuted as an adult. Riley denied knowledge of the crimes, saying that he was looking for a job at the time of their commission. A neutron activation analysis was performed on Riley's hand to determine whether he had fired a gun and he was fingerprinted in an adjacent room. Riley's hand twitched while the neutron activation analysis was being performed. (Appendix A, page 7)

Thomas Riley was taken to the office of the Chief of Police for further questioning at about 9:00 p.m. Miranda warnings were not readministered. Riley was told that his clothing and hair samples would be analyzed and of the purpose of the neutron activation

analysis. The District Court concluded that "[B]efore any statement was given by petitioner, he was told of the various investigative procedures which were being used and was advised of the evidence against himself as it was being collected by the police officers. This procedure was presumably an investigative technique to break down petitioner's reluctance to confess, but the information was truthful and unembellished." (Appendix A, page 7)

Despite the denials of Sergeant Reed and Officer Jackson, the District Court believed Riley's testimony that after he initially denied having been at the cemetery Riley requested to see his father. At the evidentiary hearing, Riley made an offer of proof indicating that he wanted to ask his father to obtain an attorney for him. This is consistent with Riley's state court testimony. However, during the interrogation Riley did not indicate why he wanted to see his father. After his request was refused, Riley confessed to the homicides. While doing so, Riley was nervous; his voice cracked; and a tear appeared in one eye. (Appendix A, pages 7-8)

The principal interrogation officer, Sergeant Reed, told Thomas Riley prior to confessing that "everybody had a good reason for doing what they do". (Reed, Transcript, pages 171-172)

After confessing, Riley repeated what he had said in abbreviated form to his brother Ernest. He also signed a statement which was transcribed by a court reporter. The taking of that statement was completed at approximately 11:00 p.m. Following this interrogation session, Riley was fed a chicken dinner. After midnight he and his brother were permitted to see their father. (Appendix A, page 8)

Thomas Riley was clad in underpants, a t-shirt, socks and a blanket throughout the interrogation process. (Appendix C, page 3, #12) Thomas Riley was manacled to the cell bunk at waist level until 8:00 p.m. (Appendix C, page 3, #11)

At the time of his arrest Thomas Riley was 16 years old. He dropped out of school in the 8th grade. (Appendix A, page 14) In 1970 he scored 57 in a group IQ test. (Appendix A, page 14) His academic development was poor. (Appendix C, page 2, #2)

Prior to his arrest on these charges, Thomas Riley did not have

any criminal convictions or juvenile court dispositions. He had had three prior police stationhouse adjustments, however those encounters did not involve the recitation of Miranda warnings, interrogation, or assistance of counsel. (Appendix A, page 14; Appendix C, page 2, #3)

For at least six weeks before his arrest Thomas Riley had lived with his brother Ernest (Appendix A, page 14), although it was Ernest Riley, Sr., the father, who had given his sons money to pay for the rent and food. (Riley, Transcript, page 43)

REASONS WHY CERTIORARI SHOULD BE GRANTED

I BY REQUESTING TO SPEAK TO HIS FATHER DURING CUSTODIAL INTERROGATION, AS A MEANS OF OBTAINING THE SERVICES OF AN ATTORNEY, THOMAS RILEY, A 16 YEAR OLD JUVENILE, INVOKED HIS RIGHT TO COUNSEL AND SILENCE UNDER THE FIFTH AMENDMENT. THE BLATANT REFUSAL BY THE POLICE TO PERMIT THOMAS RILEY TO SPEAK TO HIS FATHER WHO WAS PRESENT IN THE POLICE STATION VITIATES HIS CONFESSION.

This Court is urged to grant certiorari in order to settle an important question of law which was left open in Fare v. Michael C., 442 U.S. 707 (1979), namely, whether a request by a juvenile during police interrogation to consult with a parent is an invocation of the juvenile's right to counsel and silence under the Fifth Amendment. Courts and legal scholars have focused on the diversity of views which exists today. Therefore the issue is ripe for this Court's resolution.

In the case at bar the United States Court of Appeals held that Thomas Riley's request to see his father was neither an explicit expression of a desire to consult with an attorney (Appendix A, page 10), nor the functional equivalent of a request for an attorney. (Appendix A, page 11) The Court also concluded that Riley's request was not an invocation of his right to silence. (Appendix A, page 9) The Court however acknowledged the importance of parental consultation during custodial interrogation (Appendix A, pages 10-11), concluding that parental consultation is not constitutionally required. (Appendix A, page 11) Instead the Court adopted a "case-by-case" approach, without any constitutional foundation for the test, as a method of evaluating whether a particular request for a parent can be construed as a request for counsel, stating: "we believe that the proper characterization of such a request depends upon an examination of the abilities of the parent or guardian requested on the one hand, and of the accused juvenile on the other."[1] (Appendix A, pages 13-14)

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[1]Even under this narrow test Riley should prevail. It was stipulated to by the parties that prior to his arrival at the Alsip police station, Mr. Ernest Riley, Sr. telephoned and spoke with Attorney Harry Levi and asked him for his assistance in regard to his

This newly formed standard is constitutionally defective.

The Seventh Circuit position stands at odds with a growing number of states which constitutionally permit or require parental consultation. See e.g.;

New Jersey

(In re Carlo, 48 N.J. 224, 225 A. 2d 110 (1966));

Pennsylvania

(Commonwealth v. Roane, 459 Pa. 389, 329 A. 2d 286 (1974));

Georgia

(Freeman v. Wilcox, 119 Ga. App. 325, 167 S.E. 2d 163 (1969));

Maryland

(Walker v. State, 12 Md. App. 684, 280 A. 2d 260 (1971));

Louisiana

(State in Interest of Dino, 359 So. 2d 586 (La., 1978));

Massachusetts

(Commonwealth v. Cain, 279 N.E. 2d 706 (Mass., 1972));

(footnote continued)

sons' legal problem. Levi informed him that he was not a criminal attorney and suggested that he obtain the help of another lawyer and that he (Riley, Sr.) go to the Alsip police station. (Appendix C, page 5, #23) The Court of Appeals made no mention at all of this crucial factor.

The District Court stated, but made no finding of its own, that "[t]he [state] trial court found that the father did not want to see his son on this subject." (Appendix B, page 5, #6, Abstract, 85-86) It is noteworthy that the state trial court was not aware of what efforts Riley, Sr. had made in his attempt to get counsel for his son. Since the District Court was presented with this additional evidence by stipulation, but failed to take it into account, it now stands that Riley, Sr. did indeed want to see his son on this subject. Alternatively, it is our position that whether Riley, Sr. wanted to see his son on this subject or another is immaterial, since the District Court placed the focus on the wrong party. After all the inquiry should have been directed at Thomas Riley's perception of his rights in demanding to see his father, rather than the intent of the parent. Cf., Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

Thomas Riley was not "sufficiently independent of his parents" as the Court of Appeals concludes. (Appendix A, page 14) While Thomas lived with his brother Ernest, it was the father who gave Ernest and Thomas money to pay for rent and food. (Riley, Transcript, page 43)

Indiana

(Lewis v. State, 259 Ind. 431, 288 N.E. 2d 138 (1972));

Colorado

(People v. Saiz, 620 P. 2d 15 (Col., 1980));

California

(In re Patrick W., 104 Cal. App. 3d 615, 163 Cal. Rptr. 848 (1980)).

A contrary position has been articulated by other states. See e.g.;

Kansas

(State v. Young, 220 Kan. 541, 552 P. 2d 905 (1976));

Wisconsin

(Theriault v. State, 66 Wis. 2d 33, 223 N.W. 2d 850 (1974));

Utah

(State v. Hunt, 607 P. 2d 297 (Utah, 1980)).

The only other Circuit Court of Appeals which has analyzed the issue is the Fifth Circuit. Its position, however, is ambivalent. See, Chaney v. Wainwright, 561 F. 2d 1129 (5th Cir., 1977). See also, Goldberg, J., dissenting. 561 F. 2d at 1133-1135.

Legal scholarship has analyzed the request for parental consultation both as an invocation of the right to remain silent and as the functional equivalent of a request for counsel. Ferster and Courtless, The Beginning of Juvenile Justice, Police Practices, and the Juvenile Offender, 22 Vand. L. Rev. 567, 596 (1969); Vogel, Custodial Interrogation of Juveniles in the United States and Florida, 9 Florida State University Law Review 157, 183 (1981); Comment, Interrogation of Juveniles: The Right to a Parent's Presence, 77 Dickinson Law Review 543, 557 (1972).

Our position is shared by national legal and judicial bodies. See, IJA-ABA Juvenile Justice Standards Project, Standards Relating to Police Handling of Juvenile Problems, §3.2 (1977); See also, Council

of Judges of the National Council on Crime and Delinquency, Model Rules for Juvenile Courts, Rule 25 (1969).

The Court of Appeals reached its conclusion that Thomas Riley's request for his father was not the functional equivalent of a request for an attorney relying essentially on two Fare factors: "Riley's father is not trained in the law. Consequently, he was 'not in a position to advise the accused as to his legal rights. Neither is he a trained advocate, skilled in the representation of the interests of his client before both police and courts.' Fare, 442 U.S. at 719." (Appendix A, page 11) These erroneous assumptions cannot be reconciled with the most recent pronouncement of this Court in California v. Prysock, ___ U.S. ___, 29 Cr L 4110 (1981). In Prysock this Court recognized the value of parental presence during police interrogation. One useful role parents can serve is to assure the child's understanding of his right to appointed or retained counsel. They can further advise the child whether or not they intend to hire an attorney for the child. If they do not intend to engage counsel, they can clarify the child's understanding of his constitutional right to have counsel appointed before police questioning. 29 Cr L 4110, 4111 (1981).

Justices Stevens, Brennan and Marshall, in dissent, noted that "[a] juvenile informed by police that he has a right to counsel may understand that right to [mean]...that he has a right to have a lawyer represent him if he or his parents are able and willing to hire one..." ___ U.S. ___, 29 Cr L. 4110, 4112.

Thomas Riley understood the Miranda admonitions to mean that he had the right to secure the services of a lawyer through his father.[2]

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[2]Thomas Riley testified at the federal evidentiary hearing that when he was given his Miranda rights, his understanding of "counsel" was "[i]t meant father to me." (Riley, Transcript, page 41) The District Court erred in limiting Thomas Riley's testimony in this regard and then impugn Riley's veracity by his offer of proof. At the evidentiary hearing counsel asked Thomas Riley why he wished to see his father. Respondents' objection was sustained. (Transcript, page 36) In his offer of proof Riley said: "I knew that he had a lawyer, a family lawyer, and I wanted him to get in touch with one, and also to tell him about what my brother had told me." (Riley, Transcript, page 38) On Respondents' cross-examination Riley said he wanted to see his father about what his brother Ernest said to him, viz., that

Unlike the juvenile in Prysock, Thomas Riley never spoke to his father prior to confessing. He was deprived of the opportunity of expressing to his father his desire for the services of a private attorney and of learning what his father intended to do for him.

Petitioner respectfully submits that a correct application of the analysis utilized by this Court in Fare v. Michael C., 442 U.S. 707 (1979), to the circumstances surrounding his interrogation demonstrates that the Court of Appeals erred. And that by erring in the manner that it did, with an artificially narrow reading of Fare v. Michael C., the Court of Appeals has put all juveniles in a precarious constitutional position.

In Fare v. Michael C., this Court rejected a juvenile's claim that a request for his probation officer during a custodial interrogation was a per se invocation of the Fifth Amendment right to counsel. The Court pointed out that the role which an attorney might play at a custodial interrogation, in offering legal assistance to the juvenile, distinguished attorneys from probation officers, clergymen and close friends. 442 U.S. 707, 722. However this Court explicitly omitted any comparisons of the roles of parents and attorneys in Fare. Thus the only distinction the Court attempted to draw was one between the functions and duties of attorneys and those of probation officers vis-a-vis juveniles. In Riley's case, the Court of Appeals erred in attempting to cast that distinction as a new narrowing of the principles of Miranda v. Arizona, 384 U.S. 436 (1966).

In the case of a request for a probation officer, this Court rested its analysis on two points. First, as a peace officer and an

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(footnote continued)

he would be treated differently because he was a juvenile. (Riley, Transcript, page 61) In the state court proceedings, Thomas Riley testified that he wanted to see his father "because I didn't have other means of getting in touch with the lawyer." (Abstract, page 48) The District Court rejected the offer of proof "because it is based upon petitioner's unexpressed mental processes but also because, even if admissible, the testimony is unreliable and not believable." (Appendix B, page 8, #12) The District Court stands at odds with the state trial court who found Thomas Riley's testimony credible. (Abstract, page 76)

The Court of Appeals correctly found that Riley's offer of proof is consistent with his state court testimony. (Appendix A, page 8)

employee of the State, the probation officer faced conflicting duties which would undermine whatever assistance he could have offered the juvenile. Fare v. Michael C., 442 U.S. 707, 720. Second, the probation officer was not in a position to provide the juvenile with legal assistance. Fare v. Michael C., 442 U.S. 707, 722. Riley's request to see his father undoubtedly satisfies these two grounds. He sought his father to obtain through him retained counsel. And thus, if the interrogating officers had honored his request, Riley would have received the legal assistance necessary for protecting his rights during the interrogation. Moreover, the role of Riley's father was not vitiated by the antagonistic interests which the Court noted in the probation officer's role. As a proposition of common sense and daily experience, the exclusive interest of concerned parents is the welfare of their children. This is virtually axiomatic. Requests for parents are therefore distinguishable from requests for probation officers on the basis of the two grounds utilized by the Court in Fare v. Michael C.. Such a conclusion is undoubtedly consistent with the Court's omission of parents in the category of persons the Court was prepared to compare with attorneys, i.e. probation officers, clergymen and close friends. Consequently, Riley's request for his father triggered his right to counsel.

With respect to Riley's claim that he had invoked his Fifth Amendment right to remain silent during his interrogation, the Court of Appeals concluded that none of the circumstances surrounding the interrogation warranted a finding that he attempted to assert his right to remain silent. (Appendix A, page 10) In reaching this conclusion, the Court of Appeals relied on Fare v. Michael C., 442 U.S. 707 (1979). Its reliance on Fare is misplaced. This Court in Fare v. Michael C., 442 U.S. 707, 724 held that a bare request for a probation officer, "[i]n the absence of further evidence", was not sufficient evidence upon which to conclude that the request was an assertion of the juvenile's right to remain silent. Thomas Riley sought to speak to his father before he made the inculpatory statements which his brother had urged him to make. He was 16 years old with an IQ of 57 and an 8th grade education. He was inexperienced

with police interrogation methods and was subjected to a rather difficult and highly unusual interrogation procedure.

Presented with these circumstances, the Court of Appeals should have found that Thomas Riley's request was an assertion of his Fifth Amendment right to remain silent. Although the Court of Appeals ignored the principles articulated in Miranda v. Arizona, 384 U.S. 436 (1966), in its summary dispositon of this issue, Miranda is the seminal case which established the standards this Court applied in Fare v. Michael C.. The procedures mandated by this Court in Miranda were specifically aimed at giving suspects resources which were intended to dispel the coercive environment of custodial interrogations. That a juvenile should turn to a parent waiting out in a hallway to fend off the inherently coercive atmosphere of a custodial interrogation is undeniable. Even the District Court characterized the request as one seeking "moral support" from the parent. (Appendix B, page 8, #13) Miranda permits a suspect to call for help from another person. The call for help can appear "in any manner". Miranda v. Arizona, 384 U.S. 436, 444. A juvenile's request for his parent is such a call for help. To treat the juvenile's request for a parent in any other fashion would be an exaltation of form over substance.

II MEASURED BY THE TOTALITY OF THE CIRCUMSTANCES TEST NEITHER THOMAS RILEY'S CONFESSION NOR HIS WAIVER OF RIGHTS IS VOLUNTARY.

This Court is urged to grant certiorari with a view to either reexamine the efficacy of the totality of the circumstances test as a measure of juvenile confessions or put some teeth into the standard to make it constitutionally meaningful.

The United States Court of Appeals for the Seventh Circuit has made a mockery of the test as a method of inquiry into the lawfulness of a juvenile's confession in finding Thomas Riley's confession and waiver of his rights voluntary. (Appendix A, pages 16-18)

In Fare v. Michael C., 442 U.S. 707, 725 (1979), this Court approved the "totality-of-the-circumstances" test in judging the voluntariness of the waiver of rights of juveniles during custodial interrogation, and in Haley v. Ohio, 332 U.S. 596 (1948), and Gallegos v. Colorado, 370 U.S. 49 (1962), this standard was previously adopted to judge the voluntariness of the juvenile's confession itself.

Either the Fare standard is ineffective, and therefore there may be a need to reexamine it as some commentators have suggested,[3] or the courts below have intentionally excluded Thomas Riley from the "special care" scrutiny to which he is entitled because he stands convicted of two counts of murder and one count of manslaughter. Cf., Mincey v. Arizona, 437 U.S. 385, 389-390 (1978).

The salient facts here speak for themselves. Measured by the totality of the circumstances test, neither Thomas Riley's waiver of rights nor his confession is voluntary.

Where the Court of Appeals and the District Court factually determined that Thomas Riley had requested to see his father but was not permitted to do so until after he had confessed, and where the Court of Appeals and the District Court found so many relevant factors

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[3]Vogel, Custodial Interrogation of Juveniles in the United States and Florida, 9 Florida State University Law Review 157 (1981); Grisso, Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis, 68 California Law Review 1134 (1980); Bailey and Soderling, Born to Lose - Waiver of Fifth and Sixth Amendment Rights by Juvenile Suspects, 16 Clearinghouse Review 127 (1981).

which substantiate Thomas Riley's claim that his confession was wrung from him by unconstitutional means, it follows that the confession and waiver of rights are not legally sufficient to withstand the totality of the circumstances scrutiny. Under such circumstances the confession must be suppressed. See, State v. Brooks, 127 Ariz. 130, 618 P. 2d 624, 628-629 (1980), opinion by Justice O'Connor. See also, Fare v. Michael C., 442 U.S. 707, 732-734 (1979), Powell, J., dissenting.

AGE

At the time of his arrest, Thomas Riley was 16 years old. (Appendix A, page 3)

EDUCATION AND INTELLIGENCE

Thomas Riley dropped out of school in the 8th grade. (Appendix A, page 14)

In 1970 he scored 57 in a group IQ test.[4] (Appendix A, page 14)

His academic development was poor. (Appendix C, page 2, #2)

PRIOR EXPERIENCE WITH LAW ENFORCEMENT

Prior to his arrest on these charges, Thomas Riley did not have any criminal convictions or juvenile court dispositions. He had had three prior police stationhouse adjustments, however, those encounters did not involve the recitation of Miranda warnings, interrogation, or assistance of counsel. (Appendix A, page 14; Appendix C, page 2, #3)

REQUEST TO SEE FATHER

Thomas Riley requested to see his father. His request was refused. He then confessed. (Appendix A, page 8)

POLICE CONDUCT WAS CALCULATED TO OBTAINING A CONFESSION

Thomas Riley was not allowed to see his father until midnight, after he had given a confession. (Appendix A, page 8)

Immediately upon his arrest, Thomas Riley was returned to the

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[4]Empirical studies show that most juveniles are incapable of knowingly and intelligently waiving their rights during custodial interrogation. Ferguson and Douglas, A Study of Juvenile Waiver, 7 San Diego Law Review 39, 54 (1970); Grisso, Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis, 68 California Law Review 1134, 1164-1166 (1980), finding that 16 year old juveniles, particularly with IQ scores below 80, have no greater comprehension of their rights than the younger juveniles.

cemetery, the scene of the triple homicide, where he viewed the covered body of one victim and was subjected to a suggestive show-up identification procedure. His father and stepmother were not allowed to see him there. He was "scared" and "nervous". (Appendix A, pages 4-6)

At the police station he was strip searched on arrival (Scaglione, Transcript, page 97), manacled to the bars of his cell for two hours while clad in undershorts, t-shirts, socks and a blanket wrapped around his waist (Appendix B, page 4, #5), and interrogated for over three hours "dressed" in the same manner. (Appendix A, pages 6-8)

Thomas Riley overheard Marvin Foster, Sr., the father of one of the victims, accost his brother, Ernest Riley, verbally in the police lockup. (Appendix A, page 6)

Before obtaining the confession, police officers told Thomas Riley what various investigative procedures were being used and what evidence the police had already collected against him. The District Court concluded that "this prccedure was presumably an investigative technique to break down petitioner's reluctance to confess..." (Appendix B, page 6, #8; Appendix A, page 7)

Prior to confessing Thomas Riley was not readvised of his Miranda rights. (Appendix A, page 7)

As he confessed Thomas was nervous, a tear appeared in one eye, and his voice cracked. (Appendix A, page 8)

Riley's hand twitched while a neutron activation test was being performed on his hand for traces of gun powder. This procedure preceded the confession. (Appendix A, page 7, footnote 10)

The principal interrogation officer, Sergeant Reed, told Thomas Riley prior to confessing that "everybody had a good reason for doing what they do". (Reed, Transcript, pages 171-172)

As Thomas Riley confessed to Sergeant Reed he was "scared and feeling kind of helpless". (Riley, Transcript, pages 38-39)

PRESSURE BY ERNEST RILEY

Ernest Riley, Thomas' 18 year old adult brother who was locked up in an adjacent cell, told him to take the "weight" if any charges were

made against them because Thomas was a juvenile. (Appendix A, page 6)

SUMMARY

The circumstances surrounding Thomas Riley's confession--his return to the cemetery and viewing the body of one of the victims, the suggestive identification procedure, the strip search at the police station, the removal of his clothing, the handcuffing to the cell bars, the refusal by the police to permit him to see his father, the overbearing investigative pressures, his extremely low intelligence, the lack of prior criminality and experience in police interrogation methods, and more--stand in vivid contrast to those of the experienced juvenile in Fare v. Michael C., 442 U.S. 707, 726-727.

In Fare Justice Blackmun described as significant the fact that the juvenile had had considerable experience with the police and had a record of several arrests, that he was previously confined in a youth camp and had experience with the probation system, that there was no evidence of insufficient intelligence, and that the interrogation method was innocuous. Fare v. Michael C., 442 U.S. 707, 726.

In this case, not only were Thomas Riley's background and experiences different, but the physical components of his interrogation were also more demanding and unusual. Finally, in light of the emphasis which Fare v. Michael C. puts on an inexperienced juvenile's request for his parent, 442 U.S. 707, 725, the totality of the circumstances surrounding Riley's interrogation establishes beyond a reasonable doubt that his confession and waiver of rights were not voluntary.

CONCLUSION

WHEREFORE, Thomas Riley respectfully requests that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-2588

UNITED STATES OF AMERICA ex rel. THOMAS RILEY,

Petitioner-Appellant,

v.

GAYLE FRANZEN, Director, Illinois Department of Corrections, and LOU V. BREWER, Warden, Stateville Correctional Center,

Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79-C-1681—Thomas R. McMillen, *Judge.*

ARGUED JUNE 15, 1981—DECIDED JULY 10, 1981

Before SWYGERT, *Senior Circuit Judge,** PELL, and BAUER, *Circuit Judges.*

PER CURIAM. Petitioner-appellant Thomas Riley appeals from a judgment, entered after an evidentiary hearing, denying his petition for a writ of habeas corpus. Riley argues that for two reasons the district court erroneously concluded that his confession, given during a custodial interrogation, properly was admitted into evidence at his state court trial. First, Riley asserts that by requesting to speak with his father during the interrogation he invoked his rights to silence and to the assistance of counsel, as delineated in *Miranda v. Arizona*, 384 U.S. 436 (1966), and that by failing to honor that request the police violated those rights. Riley also contends that his confession was involuntary. For the reasons given below, we affirm.

* At the time of oral argument Judge Swygert was a circuit judge in active service; on July 1, 1981 he assumed senior status.

I.

A.

After a jury trial in the Circuit Court of Cook County, Illinois, Riley was convicted of two counts of murder and one count of involuntary manslaughter. He was sentenced to two concurrent terms of imprisonment of 75 to 225 years for the murder counts and to a term of imprisonment of 3 to 10 years for the involuntary manslaughter count, concurrent with the murder sentence. Prior to trial, Riley unsuccessfully moved to suppress his confession, presenting, *inter alia*, the two arguments pressed in these habeas proceedings.

Riley's conviction was affirmed by the Illinois Appellate Court. *People v. Riley*, 49 Ill. App.3d 304, 364 N.E.2d 306 (1st Dist. 1977). That court also rejected Riley's challenges to the admissibility of his confession. The Illinois Supreme Court denied leave to appeal and, with Justices Brennan and Marshall dissenting, the Supreme Court denied certiorari. *Riley v. Illinois*, 435 U.S. 1000 (1978).

Having exhausted his available state court remedies,[1] Riley filed a petition for a writ of habeas corpus in the district court urging as grounds for relief the two arguments presented here. In an unpublished decision, the district court denied the petition without a hearing. *United States ex rel. Riley v. Franzen*, 79-C-1681 (N.D. Ill. August 16, 1979) (McMillen, J.). However, in a previous appeal, we remanded with instructions to conduct an evidentiary hearing.[2] After the resultant eviden-

[1] *See* 28 U.S.C. § 2254(b).

[2] Specifically we stated:

> [T]he district court should conduct a hearing to determine with as much specificity as possible the historical facts relating to defendant's arrest, incarceration and subsequent confession. In particular, we believe that the district court should determine whether defendant was returned to the scene of the killings and, if so, for what purpose and for how long. It is also significant for the totality of the circumstances test to determine whether and for how long

(Footnote continued on following page)

tiary hearing, Judge McMillen made extensive findings of fact and again denied habeas relief. *United States ex rel. Riley v. Franzen*, 79-C-1681 (N.D. Ill. October 7, 1980) (Unpublished Memorandum). This appeal followed.

B.

For our purposes the facts regarding the homicides themselves are set forth adequately in the opinion of the Illinois Appellate Court. *People v. Riley*, 49 Ill. App.3d at 307. Consequently, those facts will not be restated here. However, the facts pertinent to our disposition of Riley's confession claims must be set forth in some detail. In this regard we note that Riley does not argue, nor does it appear, that the district court's findings are clearly erroneous. However, we have found it necessary to amplify those findings by utilizing the parties' stipulations which were submitted to the district court and by examining the evidentiary hearing transcript and state court record ourselves.

At approximately 5:15 p.m. on February 27, 1974, shortly after the shooting deaths of three young men at the Burr Oak Cemetery in Alsip, Illinois were reported to the police, Thomas Riley, then eight days short of his seventeenth birthday, and his brother Ernest, then eighteen years old, were arrested in connection with the homicides as they hitched a ride in the vicinity of the cemetery.[3] The brothers initially were stopped by officers Pennix and Moore of the Robbins Police

[2] *continued*
defendant was manacled to the bars of his cell, how long defendant was clothed in only his underwear and a blanket, and whether and when defendant asked to speak with his father. We do not intend this list to be exhaustive by any means. The district court should resolve conflicts in testimony and determine facts necessary to conclude whether defendant's confession was voluntary.

United States ex rel. Riley v. Franzen, 79-2029, Unpublished Order at 3 (7th Cir. April 7, 1980).

[3] No challenge is made to the validity of the arrest, obviating the need to discuss its circumstances, the bases for probable cause, and the like.

Department.[4] Officer Pennix contacted the Alsip Police Department, which sent a patrol car driven by Alsip Police Officer Scaglione. Alsip Police Sgt. Rice also was present at this time.

Officer Scaglione drove the two brothers to the Burr Oak Cemetery.[5] According to Riley, the drive took approximately five or ten minutes, during which Officer Scaglione neither advised the brothers of their "*Miranda*" rights nor questioned them.[6] There were many police and police vehicles at the cemetery upon the brothers' arrival there. Officer Scaglione parked the squad car approximately seventy-five feet inside of the cemetery gate. There, the brothers sat inside of the squad car for approximately twenty minutes until they were taken to the Alsip Police Station. *United States ex rel. Riley v. Franzen*, 79-C-1681, Unpublished Decision at 4, Finding No. 4 (N.D. Ill. October 7, 1980)

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[4] According to Riley, upon apprehending them Officer Pennix asked the brothers where the weapons were. The brothers responded "What weapons?" Then Officer Pennix said, "The weapons you niggers used to kill that guy with." Evidentiary Hearing Transcript at 15-16 (hereinafter cited as "E.H."). Officer Pennix, who is black, denied interrogating the brothers or referring to them as "niggers."

The district court made no specific findings on these factual issues. In this appeal Riley does not argue that Officer Pennix's interrogation or reference to him as "nigger," if true, rendered his confession involuntary. Also, because any statements made by Riley at this time apparently were not admitted at trial, we need not determine the propriety of Officer Pennix's interrogation, if any, of Riley immediately after he was apprehended. Consequently we leave these factual issues unresolved.

[5] Riley testified that another police officer was in the squad car on the way to the cemetery. However, Officer Scaglione testified that he was alone with the two brothers with a second squad car following them to the cemetery. Again, we see no need to resolve this factual issue.

[6] Officer Scaglione testified that Sgt. Rice may have advised the brothers of their *Miranda* rights. However, the parties stipulated that Riley was not given *Miranda* warnings at the time of his arrest.

(hereinafter cited as "Decision"); E.H. at 19, 89; *see also* Stipulations, ¶ 10.[7]

Essentially two things pertinent to our inquiry occurred during the brothers' stay at the cemetery. First, the body of one of the homicide victims covered by a blanket was lying in Riley's view. He "knew what was there but . . . no coercive reference was made to it by any police officer." Decision at 3-4, Finding No. 4. Also, "two young boys who had originally told the police where the suspects had fled were brought to the police car but were not able to identifty the petitioner or his brother. The petitioner's father and stepmother had been brought to the cemetery but were not allowed any contact with the petitioner." *Id.* at 3, Finding No. 3; *see also* Stipulations, ¶12. There is no indication that Riley was interrogated at the cemetery or made any challenged statements while there.

Riley and his brother were driven from the cemetery separately. As Riley left the cemetery he was given

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[7] The Illinois Appellate Court found that the brothers were detained at the cemetery for approximately one and a half hours. *People v. Riley*, 49 Ill.App.3d at 306. In our previous order we refused to afford a presumption of correctness under 28 U.S.C. § 2254(d) to this finding of fact because it was made by the state appellate court, rather than by the state trial court. *U.S. ex rel. Riley v. Franzen*, 79-2029, Unpublished Order at 2-3 (7th Cir. April 7, 1980). It is now clear that findings of fact made by a state appellate court must be given the benefit of the § 2254(d) presumption if the statutory criteria are satisfied otherwise. *See Sumner v. Mata*, ... U.S. ....., 101 S.Ct. 764 (1981). Neither party has briefed or argued the question of the effect of *Sumner*, which was decided after the district court's decision on remand in this case, upon this appeal in general or upon our review of the district court's finding on this factual issue in particular. However, in light of the consistency of the evidentiary hearing testimony of both sides' witnesses on this issue, Riley's relatively light emphasis upon the length of time spent at the cemetery while arguing that his confession was inadmissible, and the fact that no challenged statements were elicited during the time at the cemetery, we accept the district court's finding on this factual issue.

Miranda warnings by a plainclothes police officer. Although Riley testified that he was "scared" and "nervous," E.H. at 23, he also acknowledged that he understood the warnings when they were read to him.

Riley arrived at the Alsip police station at approximately 6:00 p.m.

> [His] clothing was taken for the purpose of a laboratory examination, but he was shortly thereafter allowed to put on his underclothes and socks. He was also given a blanket which he wrapped around his waist.[8] He was put in a cell next to his brother Ernest and, when they began conversing between themselves, a police officer handcuffed one hand of each boy to his respective bunk. This did not cause any particular discomfort, since the boys were able to sit down on their bunks, but it did prevent them from communicating further. This restraint was removed at or shortly after 8:00 p.m.

Decision at 4, Finding No. 5 (footnote added).

During this initial two hour period in the police station Riley overheard the father of one of the victims "accost the older brother verbally. [The father] did not have any conversation with the petitioner, however." Decision at 6, Finding No. 8. Also, "[Riley's] older brother Ernest had told him that since [Riley] was a juvenile, he should take the 'weight' if any charges were made." *Id.* at 5, Finding No. 7.[9] Riley's father arrived at the police station at approximately 7:30 p.m.

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[8] The parties stipulated that Riley "was clad in underpants, socks and a blanket while being interrogated from 8:00 p.m. through 10:55 p.m." Stipulations, ¶12. However, Sgt. Reed testified that he was comfortable in his shirt-sleeves while in Riley's cell.

[9] "[Riley] was in fact about 8 days short of becoming 17 years old, but he had originally told the officers that he was 17. The officers attempted to verify his age as well as they could and reasonably believed that the petitioner was 17 before they proceeded in the questioning or took any state-

(Footnote continued on following page)

At approximately 8:00 p.m. Riley's handcuffs were removed and he was given *Miranda* warnings. Riley replied that the warnings had been given twice previously. At this time, the interrogation of Riley was limited to questions concerning his age.

Without readministering *Miranda* warnings and having been misinformed by Riley's parents that Riley was seventeen years old, Sgt. Reed again spoke with Riley in his cell at approximately 8:30 p.m. Sgt. Reed told Riley that he would be prosecuted as an adult. Riley denied knowledge of the crimes, saying that he was looking for a job at the time of their commission. A neutron activation analysis was performed on Riley's hand to determine whether he had fired a gun and he was fingerprinted in an adjacent room.[10]

Riley was taken to the office of the Chief of Police for further questioning at about 9:00 p.m. *Miranda* warnings were not readministered. Riley was told that the clothing and hair samples would be analyzed and of the purpose of the neutron activation analysis.

> [B]efore any statement was given by petitioner, he was told of the various investigative procedures which were being used and was advised of the evidence against himself as it was being collected by the police officers. This procedure was presumably an investigative technique to break down petitioner's reluctance to confess, but the information was truthful and unembellished.

Decision at 6, Finding No. 8.[11] Despite the denials of Sgt. Reed and Officer Jackson, the district court believ-

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[9] *continued*

ment." Decision at 5-6, Finding No. 7. The measures which the police took in trying to verify Riley's age included inquiries to his parents, both of whom told the police that Riley was seventeen years old.

[10] Riley's hand twitched while the neutron activation analysis was being performed.

[11] At the evidentiary hearing, Riley testified that Sgt. Reed commenced the interrogation by telling Riley that his brother

(Footnote continued on following page)

ed Riley's testimony that after he initially denied having been at the cemetery Riley requested to see his father.[12] At the evidentiary hearing, Riley made an offer of proof indicating that he wanted to ask his father to obtain an attorney for him. This is consistent with Riley's state court testimony. However, during the interrogation Riley did not indicate why he wanted to see his father. After his request was refused, Riley confessed to the homicides. While doing so, Riley was nervous; his voice cracked; and a tear appeared in one eye.

After confessing, Riley repeated what he had said in abbreviated form to his brother Ernest. He also signed a statement which was transcribed by a court reporter. The taking of that statement was completed at approximately 11:00 p.m. Following this interrogation session, Riley was fed a chicken dinner.[13] "After midnight [Petitioner] and [his brother] were permitted to see their father." Stipulations, ¶19.

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[11] *continued*

Ernest had made a confession identifying Riley as the shooter, that the neutron activation analysis showed that Riley had fired a gun and that an eyewitness could prove that Riley had been at the cemetery. Sgt. Reed denied making these statements to Riley, although he did acknowledge telling Riley that two people of the brothers' descriptions had been viewed leaving the cemetery. Officer Jackson, who was in the office when Sgt. Reed supposedly made these statements, did not hear them.

In this appeal Riley does not argue that the district court's findings on this matter are clearly erroneous or incomplete. We view the court's findings as having discredited Riley's testimony in this regard. Consequently, we will assume that Sgt. Reed did not make the statements attributed to him by Riley.

[12] The state trial and appellate courts also accepted this as true. *People v. Riley*, 49 Ill.App.2d at 310; *see also U.S. ex rel. Riley v. Franzen*, 79-2029, Unpublished Order at 2.

[13] "[T]here is no evidence that [Riley] asked for anything or was intentionally deprived of food as a condition of giving a statement." Decision at 7, Finding No. 10.

II.

Riley maintains that his request for his father was an invocation of his Fifth Amendment rights to silence and to counsel, apparently without distinguishing between these rights. However, the invocation of a defendant's right to silence may have a different impact on the permissibility of subsequent police conduct than the invocation of his right to counsel. *Compare Michigan v. Mosely*, 423 U.S. 96 (1975) (additional questioning of suspect who had invoked Fifth Amendment privilege permissible when preceded by "fresh" *Miranda* warnings and a significant time lapse), *with Edwards v. Arizona*, ... U.S. ....., 101 S.Ct. 1880 (1981) (interrogation of suspect who invokes right to counsel impermissible until suspect confers with counsel, unless he initiates subsequent contact with police). Consequently, the Supreme Court in *Mosely*, 423 U.S. at 101, n.7, and this court in *Kennedy v. Fairman*, 618 F.2d 1242, 1248 n.6 (7th Cir.), *cert. dismissed*, ... U.S. ....., 101 S.Ct. 339 (1980), and *White v. Finkbeiner*, 611 F.2d 186, 193 n.21 (7th Cir. 1979), *vacated and remanded*, ... U.S. ..... (May 26, 1981), have maintained a distinction between a suspect's *Miranda* rights to counsel and to remain silent. Thus, we cannot accept uncritically Riley's characterization of his request for his father.

First, we conclude that Riley's request was not an invocation of his right to silence. In *Fare v. Michael C.*, 442 U.S. 707 (1979), the Court reversed the judgment of the California Supreme Court which had held that a juvenile's request for his probation officer constituted an invocation of the defendant's Fifth Amendment privilege. The Court analyzed the request primarily to determine whether it could be construed as an invocation of the right to counsel.[14] However, it also rejected the argument that the request indicated a desire to remain silent.

> [T]here is nothing inherent in the request for a probation officer that requires us to find that a juvenile's request to see one necessarily constitutes

[14] This aspect of *Fare* is discussed below.

> an expression of the juvenile's right to remain silent. . . . In the absence of further evidence that the minor intended in the circumstances to invoke his Fifth Amendment rights by such a request, we decline to attach such overwhelming significance to this request.

442 U.S. at 724. Similarly, in this case we see nothing in the circumstances that warrants construing Riley's request for his father as an invocation of his right to silence. Consequently, we proceed to consider only whether that request constituted an invocation of his right to counsel.

The starting point for our inquiry into whether Riley's request for his father constituted a request for an attorney is *Miranda* itself. In that seminal case the Court stated, *inter alia*, that during a custodial interrogation "[i]f . . . [the defendant] indicates *in any manner* and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." 384 U.S. at 444-45 (emphasis supplied). Plainly, Riley's request for his father was not an explicit expression of a desire to consult with an attorney, but because under *Miranda* a request for an attorney need not be clear and unequivocal, *White v. Finkbeiner*, 611 F.2d at 189 n.13, we must determine whether it reasonably may be so construed.[15] In the circumstances of this case we find that it may not.

The Court stated in *Miranda* that "the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege . . . ." 384 U.S. at 469. This recognition of counsel's role in protecting a suspect's Fifth Amendment privilege is the basis for the pertinent aspect of the *Miranda* holding. *Fare v. Michael C.*, 442 U.S. at 719. Additionally, the Court acknowledged that a "lawyer's presence helps guard against overreaching by the police and ensures that any statements actually obtained are accurately transcribed for presentation into evidence." *Fare*, 442

[15] This is the question which Riley pressed in the Supreme Court in his unsuccessful petition for a writ of certiorari. 435 U.S. 1000 (Brennan and Marshall, dissenting.)

U.S. at 719 (*citing Miranda*, 384 U.S. at 470). With these facets of "the unique role the lawyer plays in [our] adversary system of criminal justice" in mind, the Court in *Fare* determined that a juvenile's request for his probation officer did not constitute an invocation of his right to counsel. *Id.*

At least two of the factors relied upon in *Fare* support our conclusion that Riley's request for his father was not the functional equivalent of a request for an attorney. Riley's father is not trained in the law. Consequently, he was "not in a position to advise the accused as to his legal rights. Neither is he a trained advocate, skilled in the representation of the interests of his client before both police and courts." *Fare*, 442 U.S. at 719.[16]

A third factor present in *Fare* was the unprivileged nature of communications between a juvenile and his probation officer. The parties have not discussed whether Riley's communications with his parent would have been privileged under Illinois law. However, we have not found any evidence that Illinois recognizes a parent-child privilege. Consequently, we doubt whether Riley's communications with his father, had Riley been allowed to speak to him in the stationhouse, would have been privileged because such a privilege did not exist at common law and courts have been reluctant to create new privileges, preferring to leave such matters to the legislature despite any policy reasons supporting recognition of a particular privilege. *E.g.*, *Application of A and M*, 61 A.D.2d 426, 403 N.Y.S.2d 375, 380 (4th Dept. 1978) (declining to recognize parent-child privilege) ("Surely the thought of the State forcing a mother and father to reveal their child's misdeeds, as confessed to them in private, to provide the basis for criminal charges is shocking to our sense of decency, fairness, and propriety."); *In re Kinoy*, 326 F. Supp. 400 (S.D.N.Y. 1970) (Frankel, J.) (same); *see generally* Wigmore, *Evidence*, § 2286 (McNaughton Rev. 1961); Mc-

[16] Another of the bases for *Miranda* discussed in *Fare*—to insure accurate transcription of the suspect's statements—is inapplicable here because Riley makes no challenge to the accuracy of the transcription of his confession.

Cormick, *Evidence*, § 77 (2d ed. 1973); Coburn, *Child-Parent Communications: Spare the Privilege and Spoil the Child*, 74 Dick. L. Rev. 599 (1970) (suggesting statutory creation of a parent-child privilege).

On the other hand, unlike the probation officer in *Fare*, Riley's father is not a state employee duty bound to report his son's wrongdoing. *See Fare*, 442 U.S. at 719-720. This probably would be true in most cases. We believe, however, that the result in *Fare* is based primarily upon the Court's analysis of counsel's unique role in protecting a defendant's Fifth Amendment privilege and the inability of a probation officer to satisfy that role. 442 U.S. at 721, 723.[17] On this basis, we see no grounds upon which to distinguish the request in this case from the one at issue in *Fare*.

While *Fare* seems to preclude the possibility of ever construing a juvenile's request for his probation officer during a custodial interrogation as an invocation of the suspect's *Miranda* right to counsel, we decline to formulate such a broad rule with respect to requests for a parent or guardian. The parent-child relationship is appreciably different from that between a juvenile and his probation officer. A parent may significantly aid a juvenile in asserting his Fifth Amendment privilege. The parent may be, or be able to provide, an attorney for the child.[18] Even a lay parent, unlike a probation officer, may not encourage the suspect to talk with the police or feel bound to report any confession which the child may make in confidence. Indeed, because of these and other considerations, many states require parental consultation in order for a juvenile's confession to be admissible. *E.g., People v. Saiz*, 620 P.2d 15, 19 (Col. 1980)

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[17] The conclusion that the right to counsel recognized in *Miranda* is different than, but inextricably linked to, the defendant's right to silence is buttressed by the Court's continued maintenance of the distinction between the *Miranda* right to counsel and the Sixth Amendment right to counsel, which becomes effective only after the commencement of formal criminal proceedings. *See Edwards v. Arizona*, 101 S.Ct. at 1882 n.7.

[18] In this case, apparently Riley's father unsuccessfully attempted to obtain a lawyer for his sons.

(*quoting* C.R.S. § 19-2-102(3)(c)(I) (1973)); *Lewis v. State*, 259 Ind. 431, 288 N.E.2d 138, 142 (1972); *but see State v. Young*, 220 Kan. 541, 552 P.2d 905 (1976); *Theriault v. State*, 66 Wis.2d 33, 223 N.W.2d 850, 854 nn. 11, 12 (1974) (collecting cases); *People v. Lara*, 67 Cal.2d 1365, 62 Cal. Rptr. 586, 432 P.2d 202 (1967) (*In Bank*), *cert. denied*, 392 U.S. 945 (1968). While we believe that such a rule exceeds the requirements of the Constitution, it illustrates the important role that a parent may play during a custodial interrogation of a child and militates in favor of the case-by-case approach which we adopt with respect to requests for a parent.

The only federal case involving this issue which we have found is *Chaney v. Wainwright*, 561 F.2d 1129 (5th Cir. 1977), rehearing *en banc* denied, 570 F.2d 1391 (1978), *cert. denied*, 443 U.S. 904 (1979), in which the Fifth Circuit, with Judge Goldberg dissenting, affirmed the denial of a habeas petition by a defendant who was convicted of three murders. It suggests another factor for our analysis. At the time of his arrest the petitioner in *Chaney* was seventeen years and ten months old. After his arrest and after being given *Miranda* warnings, the petitioner did not request an attorney but unsuccessfully did request permission to telephone his mother. Afterward, he made incriminating statements which were admitted into evidence. In the habeas proceedings, he unsuccessfully contended that his statements were inadmissible under *Miranda* because his request for his mother constituted a request for counsel.

The *Chaney* court's rejection of the petitioner's contention was based in part upon its refusal to view the petitioner as a "child" for purposes of constitutional analysis. It noted that the petitioner had left home without saying good-bye to his mother or truthfully informing her of his plans. Also, the petitioner was streetwise; he knew he could have an attorney but did not want one. 561 F.2d at 1131-32. In other words, some juveniles are capable of independently exercising their *Miranda* rights. *E.g., United States v. Miller*, 453 F.2d 634 (7th Cir.) (per curiam), *cert. denied*, 406 U.S. 923 (1972) (14 year old.)

Like the petitioner in *Chaney*, at the time of his arrest, for purposes of constitutional analysis, Riley certainly was no "child," although under state law he was a juvenile, albeit by a mere eight days. Riley was sufficiently independent of his parents and had sufficient understanding of his right to counsel that it is reasonable not to construe his request as one for an attorney. For at least six weeks before his arrest Riley had lived independently of his parents with his brother Ernest. He had had three previous stationhouse encounters with police, although these did not involve the recitation of *Miranda* warnings, interrogation, or the assistance of counsel. Additionally, Riley had quit school in the eighth grade, another indication of his independence from his parents. Finally, although Riley had scored 57 in a group IQ test in 1970, he testified that he understood the *Miranda* warnings when they were read to him. Thus, Riley knew that he had a right to speak with an attorney, and that one would be provided for him free of charge if he could not afford to hire a lawyer.

Riley relies upon *People v. Burton*, 6 Cal.3d 375, 99 Cal.Rptr. 1, 491 P.2d 793 (1971) (*In Bank*), in which the California Supreme Court, with one justice dissenting, held that a sixteen year old's request for his parents constituted an invocation of his privilege against self-incrimination. *Burton* was the basis for the California Supreme Court's judgment which was reversed in *Fare*. As discussed above, under *Fare* we find that Riley's request may not reasonably be construed as an invocation of his Fifth Amendment privilege. For this reason, we do not find *Burton* to be persuasive.

To summarize, we do not hold that a juvenile's request for a parent or guardian must never be construed as a request for counsel or as an invocation of his Fifth Amendment privilege. Rather, we believe that the proper characterization of such a request depends upon an examination of the abilities of the parent or guardian requested on the one hand, and of the accused juvenile on the other. Lay parents must be distinguished from lawyers, or those with the ability to protect their child's Fifth Amendment privilege. Independent, older juveniles must be distinguished from younger ones, still

living with their parents. "If it were otherwise, [any] juvenile's request for almost anyone he considered trustworthy enough to give him reliable advice would trigger the rigid rule of *Miranda*." *Fare v. Michael C.*, 442 U.S. at 723. Also, a request which manifests the juvenile's desire to see his parent in order to obtain an attorney must be treated differently from a request, such as the one in this case, in which there is no such manifestation. Finally, a single request should be viewed differently than repeated requests, especially if the repetitions are in response to a series of police questions regarding the crime under investigation. Under some circumstances, the latter properly may be viewed as an invocation of the suspect's right to silence, if not of his right to counsel.

Moreover, because of the special problems associated with uncounseled confessions by juveniles, *In Re Gault*, 387 U.S. 1, 55 (1967), it probably is desirable as a matter of policy for police to consent to a juvenile suspect's request for his parents or guardian during an interrogation.[19] As discussed above, for this reason some states either by statute or through case law, prohibit the admission into evidence of the confession of a juvenile whose parent, guardian or attorney was not present when the child was advised of his rights, when the waiver decision was made, or both, even if no request for a parent was made.

Thus, we do not believe that Riley's request for his father constituted an invocation either of his right to silence or of his right to counsel. Consequently, the refusal to comply with that request did not deprive Riley of his *Miranda* rights. We also conclude that Riley's behavior during the interrogation constituted a valid waiver of his *Miranda* rights. *See Fare v. Michael C.*, 442 U.S. at 724-27 (applying implicit waiver doctrine of *North Carolina v. Butler*, 441 U.S. 369 (1979), to a juvenile). For these reasons, the admission into evidence of Riley's confession was proper under *Miranda*.

[19] However, the police in this case apparently had valid reasons for denying Riley's request. Sgt. Reed mistakenly believed that Riley already had seen his father. Also, prior to Riley's request, Riley's father unsuccessfully had attempted to obtain a lawyer and had indicated that he did not wish to see his sons.

III.

We also are satisfied that under the familiar totality-of-the circumstances test Riley's confession was voluntary. In determining the validity of a challenged confession the "constitutional inquiry is not whether the conduct of the state in obtaining the confession was shocking, but whether the confession was 'free and voluntary . . .' [*Bram v. United States*, 168 U.S. 532, 542 (1897)]." *Malloy v. Hogan*, 378 U.S. 1, 7 (1964).[20]

Riley argues that the district court erred in its application of the "totality" analysis because it failed to exercise "special care" as required by *Gallegos v. Colorado*, 370 U.S. 49 (1962) and *Haley v. Ohio*, 332 U.S. 596 (1948). More recently, regarding confessions by juveniles the Court also remarked:

> If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.

In Re Gault, 387 U.S. at 55.

We do not view these cases as requiring us to give nearly dispositive significance to the age of the suspect, as Riley apparently would have us do. The Court's closing remarks in *Gallegos* are instructive:

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[20] Because our focus is not on the conduct of the police but upon its effect upon Riley, we do not place great emphasis upon the district court's finding that the police had a proper purpose for bringing the two brothers to the cemetery—to have eyewitnesses view them for an identification. Decision at 3, Finding No. 3. We note that absent exigent circumstances such a suggestive identification procedure ordinarily is improper and might render a resultant identification inadmissible. *See Stoval v. Denno*, 388 U.S. 293, 301-302 (1967); *see also Manson v. Brathwaite*, 432 U.S. 98 (1977). Because no identification was made at this time, however, we need not inquire into the propriety of this police conduct.

> There is no guide to the decision of cases such as this, except the totality of circumstances that bear on the two factors we have mentioned. The youth of the petitioner, the long detention, the failure to send for his parents, the failure immediately to bring him before the judge of the Juvenile Court, the failure to see to it that he had the advice of a lawyer or a friend—all these combine to make us conclude that the formal confession on which this conviction may have rested (see *Payne v. Arkansas*, 356 US 560, 568, 2 L ed 2d 975, 981 78 S Ct 844) was obtained in violation of due process.

370 U.S. at 55.

Also, although the test for establishing a valid waiver of a suspect's *Miranda* rights encompasses more than just voluntariness, *Edwards v. Arizona*, 101 S.Ct. at 1883-1884, the Court has found the traditional totality approach "adequate to determine whether there has been [such] a waiver even where interrogation of juveniles is involved." *Fare v. Michael C.*, 442 U.S. at 725.

The facts of this case are in stark contrast to those present in both *Gallegos* and *Haley*. In *Gallegos* the defendant was only fourteen years old, not nearly seventeen like Riley. Prior to signing his confession he had been in detention for five days, without his mother being allowed to see him. Here, Riley was detained for only approximately two hours before his first confession.

Haley is an even more extreme case. There, a fifteen year old boy was arrested at midnight and questioned by two policemen at a time in relays for five hours and shown his co-defendants' confessions before succumbing. Unlike Riley, he was not advised that he had a right to an attorney. Nor was he orally advised of his right to silence, although that information was contained on a written form which he was shown. Thereafter, the boy was held incommunicado for five days. 332 U.S. at 598. Indeed, Justice Douglas in his plurality opinion observed: "What transpired would make us pause for careful inquiry if a mature man were involved." 332 U.S. at 599.

Here, Riley was not mistreated. When his clothes were taken from him for testing, a blanket was provided. The room was not uncomfortably cool. Rather than being questioned incessantly over a long period immediately after his arrest, initially Riley was left alone in his cell. When Riley was questioned, he was familiar with one of the interrogators because Riley had worked on his car. As described above, the police did not attempt to exploit Riley's youth. Rather, they made extensive efforts to determine whether he was a juvenile, and only proceeded with the interrogation after they reasonably believed that he was not. Finally, even assuming that Riley was misinformed that his brother had confessed, as Riley alleges, that would not render his confession involuntary. *Frazier v. Cupp*, 394 U.S. 731, 739 (1969).

Riley also relies upon *United States v. Fowler*, 476 F.2d 1091 (7th Cir. 1973), in which we reversed an order committing a sixteen year old to the custody of the Attorney General. The defect which we found in *Fowler* was that the youth was not adequately advised of his *Miranda* rights. 476 F.2d at 1092, n.5. Thus, *Fowler* would not support reversal in this case because Riley acknowledges that he was given adequate *Miranda* warnings which he understood.

Upon consideration of Riley's characteristics, including his age and intelligence, and the circumstances surrounding his confession, we find that although he justifiably was emotionally upset his confession was made freely and voluntarily. It was not "the product of ignorance of rights or of adolescent fantasy, fright or despair." *In Re Gault*, 387 U.S. at 55.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX B

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable THOMAS R McMILLEN

Cause No. 79 C 1681 Date OCT. 7, 1980

Title of Cause U.S.A. ex rel. RILEY v. FRANZEN et al.

Brief Statement of Motion

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel

Representing

Names and Addresses of other counsel entitled to notice and names of parties they represent.

Reserve space below for notations by minute clerk

mc Miller J.

The petition for writ of habeas corpus is denied on the basis of the foregoing findings & conclusions. (Decision attached)

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel. THOMAS RILEY, Petitioner,	)	
v.	)	NO. 79 C 1681
GAYLE FRANZEN, Director, Illinois Department of Corrections, and LOU V. BREWER, Warden, Stateville Penitentiary, Respondents.	)	

D E C I S I O N

The petition for writ of habeas corpus in this case was heard by the court pursuant to an order of the Court of Appeals entered April 7, 1980 in its case 79-2029. The Court of Appeals remanded the case "for the purpose of conducting a new evidentiary hearing" on the issue of voluntariness of the petitioner's confession. That Court specifically requested findings made by the court hearing the witnesses, as distinguished from findings by the Illinois Appellate Court, but also

requested a determination of the "historical facts relating to petitioner's arrest, incarceration and subsequent confession."

The petitioner alone testified in support, and respondents called five police officers and former officers. The parties also filed a stipulation of facts, contained at pages 1 through 5 of the pretrial compliance, and certain transcripts of testimony taken in the state court, filed in this court on August 8, 1980. Respondents also relied on the foregoing stipulation and transcripts . Based upon the foregoing evidence, we find the following scenario occurred:

1. Petitioner and his older brother Ernest were arrested at about 5:15 in the afternoon of February 27, 1974 on a highway near the boundary of the Burr Oak cemetery in Alsip, Illinois. A triple slaying had been committed in the cemetery about an hour earlier. The two suspects were unarmed but the arresting officers noticed that their shoes and clothing had mud and cockleburrs on them which appeared to be the same as was present at the murder scene. No issue is raised in the petition for writ of habeas corpus concerning the propriety of the arrest.

2. After the two suspects were picked up and asked a few questions by Officer Pennix of the Robbins Police Department, they were taken to the Alsip police lockup where they were turned over to that jurisdiction where the murders had occurred. They were then taken in a police car to the cemetery by Officer Scaglione, then of the Alsip Police Department.

3. At the cemetery the petitioner and his older brother remained in the police car, but petitioner was able to see an object covered by a blanket. This was the body of one of the victims. The officer had a proper purpose for bringing the two suspects to the cemetery for the possibility of an identification. As a matter of fact, two young boys who had originally told the police where the suspects had fled were brought to the police car but were not able to identify the petitioner or his brother. Also the petitioner's father and stepmother had been brought to the cemetery but were not allowed any contact with the petitioner.

4. The evidence is somewhat conflicting concerning whether or not the body was in plain view, but petitioner testified that it was. He also testified that the officer told him to look at it, but Officer Scaglione testified to the contrary. In any

event, it is our finding that petitioner was able to see the blanket covering the body and knew what was there but that no coercive reference was made to it by any police officer. The witnesses agree that petitioner and his brother were taken away from the scene after about 20 minutes.

5. At the Alsip police station where they arrived shortly before 6:00 p.m., petitioner's clothing was taken for the purpose of a laboratory examination, but he was shortly thereafter allowed to put on his underclothes and socks. He was also given a blanket which he wrapped around his waist. He was put in a cell next to his brother Ernest and, when they began conversing between themselves, a police officer handcuffed one hand of each boy to his respective bunk. This did not cause any particular discomfort, since the boys were able to sit down on their bunks, but it did prevent them from communicating further. This restraint was removed at or shortly after 8:00 p.m.

6. Petitioner testified that he was told of his Miranda rights and that he understood them fully before making any statement. It is stipulated that the warnings were given at approximately 8:00 p.m. and again before a written statement

was taken at 10:15 p.m. His only request was to see his father who had been brought to the police station at about 7:30 p.m. He did not request an attorney and did not decline to make a statement. His attorney asked him on direct examination why he wished to see his father, and respondents' objection to this question was sustained. The offer of proof indicated that petitioner wanted to ask his father to get an attorney, and he had been allowed to testify in the state court hearing that "I requested to see my father because I didn't have any other means of getting in touch with the lawyer." (Abstract of Record p. 48.) His father was not allowed to see him until after he had given a statement, but his father had previously attempted to obtain an attorney, unsuccessfully. The trial court found that the father did not want to see his son on this subject (Abstract, 85-86).

7. Besides the foregoing, other things occurred prior to the interrogation which did put the petitioner under pressure. His older brother Ernest had told him that, since he was a juvenile, he should take the "weight" if any charges were made. Petitioner was in fact about 8 days short of becoming 17 years old, but he had originally told the officers that he was 17. The officers attempted to verify his age as well as they could

and reasonably believed that the petitioner was 17 before they proceeded with questioning or took any statement.

8. Also in the lockup, the father of one of the victims was allowed to come in and accost the older brother verbally. He did not have any conversation with the petitioner, however. Furthermore, before any statement was given by petitioner, he was told of the various investigative procedures which were being used and was advised of the evidence against himself as it was being collected by the police officers. This procedure was presumably an investigative technique to break down petitioner's reluctance to confess, but the information was truthful and unembellished.

9. Sergeant John Reed of the Cook County Sheriff's police testified that he took the statement from the petitioner at about 9:00 p.m. and that he appeared to be a normal young person. However, he testified that petitioner was nervous, that a tear appeared from one eye, and that his voice cracked when he gave his statement. Petitioner was not re-advised of his Miranda rights before this statement began, and the hiatus between the warnings and the statement was for the purpose of checking petitioner's age.

10. Officer Barry Jackson of the Cook County Sheriff's police also testified that, when a test was being made on petitioner's hand for traces of gun powder, the hand twitched, shortly before the petitioner began to make his statement. This occurred about 9:00 p.m. in the evening, just before the verbal statement was taken. Petitioner was not given anything to eat until after he had made his statements, although there is no evidence that he asked for anything or was intentionally deprived of food as a condition of giving a statement.

11. Petitioner himself testified that he was quite scared and nervous when he was taken to the cemetery and saw the body (which we find was actually covered by a blanket, contrary to petitioner's version). He did not testify to any other manifestations of pressure resulting either from the handcuffing or from the lack of clothing or food. He did not testify that his statements were given involuntarily or because of fear or duress.

12. The petitioner's demeanor in court satisfies us that he was nervous, perhaps frightened, at that time but that he was able to think and speak rationally. The principal exception we find to his credibility is the offer of proof to the effect that the petitioner would testify that the purpose for wanting to see

his father was to ask him to obtain a lawyer. We reject this offer, not only because it is based upon petitioner's unexpressed mental processes but also because, even if admissible, the testimony is unreliable and not believable. Petitioner was advised of his constitutional rights on at least two occasions and admittedly understood them, including the advice that he could have a lawyer present at government expense. He did not request a lawyer and was not entitled to his father's assistance in order to obtain one. He waived this right when he gave his statements. He should not be permitted to retract his waiver by testimony given on December 12, 1974 in the State court or thereafter.

13. The principal reason for wanting to confer with his father was, we find, in order to get some kind of moral support and perhaps to verify his age. However, petitioner was not then living with his father or stepmother but was living with his older brother who was supplying most if not all of their support. His older brother had already told the petitioner to implicate himself if charges were made, hence providing no moral support for him. We find and conclude that petitioner did not have an inviolable right to confer with his father, under the principle

of Fare v. Michael C., 442 U.S. 707 (1979). We note that the salient historical facts in the foregoing case are quite similar to those in the case at bar and that the Supreme Court decided the appeal by use of the record made by the California juvenile court. This case was decided after the Illinois appellate court had foreshadowed the same rationale and affirmed the use of petitioner's statements at trial. (49 Ill. App. 3d 304 (1st Dist. 1977).) The Supreme Court indicated that a 16-year old's request to see his probation officer, his parents, or his coach was not the equivalent of a request for an attorney, but should be evaluated in the light of the total circumstances.

14. On the remand, and under Fare, the question remains concerning whether petitioner's tender age resulted in an involuntary statement under all the facts and circumstances of this case. Whether or not he was 16, the police officers treated him with circumspection, because they knew there was some question of petitioner's age. On the other hand, they reasonably believed that he was 17, and a youth investigator from the Cook County Sheriff's police was on hand throughout the events in issue. Incidentally, Youth Officer Jackson and the petitioner are both black, but the other officers are white. Mr. Jackson disputed

petitioner's statement that he requested to see his father and testified that his father did not make a request to see the petitioner. He also testified that, after the statement was given, petitioner's father reluctantly went into the lockup to see his two sons.

15. A juvenile has substantially the same rights and obligations as an adult insofar as receiving Miranda warnings and making statements are concerned. The fact that petitioner was under the age of 17 is merely one of the circumstances to be weighed in determining the voluntariness of his statements, but there is no evidence, and petitioner does not contend, that the pressures to which he was subjected overcame his will or his intellect. The difference between the two age categories of persons is that a younger person is often more susceptible to suggestion and pressure than an older person. There is no dispute that petitioner was under considerable pressure when he gave his statement, and it is logical to assume that a considerable amount of this pressure arose from the fact that he had committed a triple homicide. His statement and the jury's verdict establish that petitioner and not his brother fired the gun. We find and conclude that the pressure was not overpowering, that it was not inflicted upon the petitioner for the purpose of obtaining an involuntary statement, and that the statement

which he made was in fact voluntary and with full understanding of his constitutional rights.

16. We have reconsidered the findings of fact and rulings of the State trial court judge, his failure to make specific findings on certain points, and the State appellate court's findings which were made ab initio. We find and conclude, on the basis of our own hearing and on the stipulation and additional evidence presented by the parties at and after the hearing in this court, that the petitioner's statements were not taken in violation of any of his constitutional rights and were freely and voluntarily made, not the result of duress imposed upon the petitioner by police officers or by the circumstances leading up to the statement.

On the basis of the foregoing findings and conclusions, the petition for writ of habeas corpus is denied.

ENTER:

JUDGE, U. S. DISTRICT COURT

DATED: Oct. 7, 1980

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

RECEIVED

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THOMAS R. McMILLEN, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES ex rel. Thomas Riley Petitioner, -vs- GAYLE FRANZEN, etc., et al, Respondents.	)	No. 79-C-1681

PRE-HEARING COMPLIANCE

Pursuant to a June 13, 1980 pre-hearing order the parties hereby submit the following: Stipulations of Facts, Petitioner's additional statement of the facts, Respondents' additional statement of the facts, a statement of controlling issues of law and authorities for each party, a list of documents to be offered in evidence, and a list of witnesses for each party.

I

STIPULATIONS OF FACTS

1. Riley was sixteen years of age at the time of his arrest; for at least 6 weeks prior to his arrest he had been living with his brother Ernest Riley, age 18.

2. Riley had an eighth grade education; in 1970 he scored 57 in a group I.Q. test; his academic development was characterized to be poor.

3. Prior to his arrest, Riley did not have any criminal convictions or juvenile court dispositions; on 3 prior occasions Riley had had police station house adjustments, but they did not involve the recitation of Miranda warnings, interrogation, or assistance of counsel.

4. Riley was given Miranda warnings at Burr Oaks Cemetery shortly before being transported to the Alsip police station; he made no statement at that time.

5. Officer Reed administered Miranda warnings at the Alsip cell block at approximately 8:00 p.m.; Riley replied that he had been advised twice previously.

6. Miranda warnings were given prior to the taking of a recorded statement at approximately 10:15 p.m.

7. Miranda warnings were not administered at the time of arrest, when Reed questioned Riley in his cell at approximately 8:30 p.m., or in the Police Chief's office at approximately 9:00 p.m.

8. Riley remained silent when Miranda warnings were administered at the cemetery; when Miranda warnings were given at 8:00 p.m. questions were limited to ascertaining Riley's age.

9. Following his arrest by Robbins Officer Pennix at about 5:10 p.m. Riley was transported to the Burr Oaks Cemetery.

10. Riley remained at the cemetery for twenty minutes; during that time over 100 bystanders gathered outside the gates of the cemetery.

11. After Riley was placed in a cell he was manacled to the bunk at waist level; he remained manacled until approximately 8:00 p.m. when Officer Reed removed the cuffs, this being done prior to any interrogation.

12. Riley's clothing was removed a short time after his arrival at the station house; he was clad in underpants, a t-shirt, socks and a blanket while being interrogated from 8:00 p.m. through 10:55 p.m.

13. At approximately 8:30 p.m., having been advised by his parents that Riley was 17, Reed again questioned Riley in his cell; no Miranda warnings were readministered; Riley was told he would be prosecuted as an adult; Riley denied knowledge of the crime stating he was out looking for a job; at this point neutron activation analysis test was performed on Riley's hands; he was also fingerprinted in an adjacent room.

14. At approximately 9:00 p.m. Riley was taken to the Chief's office and interrogated; no Miranda warnings were readministered.

15. At the 9:00 p.m. questioning Riley was told his clothing and hair samples would be analyzed.

16. During the 9:00 p.m. interrogation, after being informed of the purpose of the neutron activation analysis, Riley's eyes began to tear and his hand was shaking.

17. A recorded statement was taken from 10:15 - 11:00 p.m.

18. Following the last interrogation, Riley was fed a chicken dinner.

19. After midnight he and Ernest Riley were permitted to see their father.

20. Riley's father was seen by officers in the Alsip police station at various times throughout the night.

21. The clothing and shoes of the Thomas Riley and Ernest Riley were taken for evidentiary analysis because the officers observed mud and cockleburrs on them similar to the mud and cockleburrs observed earlier at the cemetery.

22. Officer Ben Harvey of the Robbins Police Department went to the home of Ernest Riley, Sr. at approximately 5:30 - 6:00 p.m. and escorted Mr. Riley and his wife to the Burr Oaks Cemetery. At the cemetery, from a distance, Riley observed his sons seated in the back of an Alsip Police Department squadcar; he was not allowed to go up to the car; he then returned home. Approximately an hour later Officer Pennix came to Riley Sr.'s home and gave him the telephone number of the Alsip Police Station and informed him that his sons were in trouble.

23. If called to testify, Mr. Riley Sr. would state that he then walked to a Midlothian drug store and telephoned and spoke with Attorney Harry Levi and asked for his assistance in regard to his sons' problem. He would further testify that Attorney Levi informed him that he was not a criminal attorney and suggested that Riley Sr. obtain the help of another lawyer and suggested that he -Riley- go to the Alsip Police Station.

24. Thomas Riley was neither physically harmed nor physically threatened with harm by any officer from the moment of his arrest onward.

ORIGINAL

NO. 81-5324

IN THE

SUPREME COURT OF THE UNITED STATES

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

THOMAS RILEY,

Petitioner,

v.

GAYLE FRANZEN, Director
Illinois Department of
Corrections, and
LOU V. BREWER, Warden,
Stateville Correctional
Center,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

TYRONE C. FAHNER
Attorney General,
State of Illinois,

HERBERT LEE CAPLAN

MELBOURNE A. NOEL, JR.,

DARRELL PANETHIERE,

Assistant Attorneys General
188 W. Randolph St., Suite 2200
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QUESTIONS PRESENTED FOR REVIEW

1. Whether a voluntary and uncoerced confession of a 16 year old juvenile should be suppressed for the sole reason that the police officers conducting the custodial interrogation failed to honor the defendant's request to see his parents.

2. Whether the four courts which have previously reviewed the record and have concluded that the petitioner's confession was voluntarily given were erroneous in reaching this conclusion.

3. Whether the denial by this Court of petitioner's earlier petition for certiorari which raised, on a substantially similar record, the identical grounds for relief should given precedential effect.

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Colo. Stat. 19-2-102(3)(c)

Colo. Stat. 22-2-2(3)(c)

Okla. Stat. tit. 10 § 1109(a)

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Krastek, "The Judicial Response to Juvenile Confessions: An Examination of the Per Se Rule," 17 Dusquesne Law Review 659, 685-686 (1980)

NO. 81-5324

IN THE

SUPREME COURT OF THE UNITED STATES

THOMAS RILEY,

Petitioner,

v.

GAYLE FRANZEN, Director
Illinois Department of
Corrections, and
LOU V. BREWER, Warden,
Stateville Correctional
Center,

Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

Petitioner's conviction was initially affirmed by the Illinois Appellate Court, First District, People v. Riley, 49 Ill. App. 3d 304, 364 N.E.2d 306 (1st Dist. 1977). Leave to appeal was denied by the Illinois Supreme Court, and certiorari was denied by this court. Riley v. Illinois, 435 U.S. 1000 (1978).

Petitioner's petition for writ of habeas corpus was denied, after evidentiary hearing, by the United States District Court for the Northern District of Illinois on October 7, 1980. United States ex rel. Riley v. Franzen, 79-C-1681 (Unpublished Memorandum). This decision was affirmed by the United States Circuit Court of Appeals for the Seventh Circuit in a decision reported at 653 F.2d 1153 (7th Cir. 1981).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition For Writ of Certiorari. (Petition at 2) However, as treated more fully in the argument portion of this Brief in Opposition, respondent does not believe the petitioner has shown any compelling reason for this Court to grant the Writ of Certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner has quoted those provisions of the United States Constitution applicable to this case. (Petition at 2-3)

STATEMENT OF THE CASE

Petitioner's rendition of the facts is adequate for purposes of this review. However, it should be noted that petitioner's characterization of his request to speak to his father as "a means of obtaining the services of an attorney" (Petition at 8) is an unwarranted inference not supported by the record below and directly contrary to the District Court's findings of fact. That court found as follows:

> "The principal exception we find to [petitioner's] credibility is the offer of proof to the effect that the petitioner would testify that the purpose for wanting to see his father was to ask him to obtain a lawyer. We reject this offer, not only because it is based upon petitioner's unexpressed mental processes but also because, even if admissable the testimony is unreliable and not believable...¶...The principal reason for wanting to confer with his father was, we find, in order to get some kind of moral support and perhaps to verify his age."
> United States ex rel. Riley v. Franzen, 79 C 1681 (Appendix B at 7-8).

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I

PETITIONER'S UNEXPLAINED REQUEST TO SEE HIS FATHER DURING CUSTODIAL INTERROGATION CANNOT BE CONSIDERED AN INVOCATION OF HIS RIGHTS TO COUNSEL AND TO SILENCE UNDER THE FIFTH AMENDMENT. THE SUBSEQUENT CONFESSION, BEING OTHERWISE VOLUNTARY AND KNOWING, WAS PROPERLY ADMITTED.

As the Seventh Circuit recognized, the central issue involved in this case is governed by the same reasoning which this Court used to support its decision in Fare v. Michael C., 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979). That decision (that a request for the presence of a probation officer during a juvenile's custodial interrogation is not the equivalent of a request for counsel or an invocation of the right to remain silent) was based upon an analysis of the lawyer's unique role in protecting a defendant's Fifth Amendment rights and the inability of a probation officer to fill that role. 422 U.S. at 721, 99 S.Ct. at 2570-2571; Riley, supra, 653 F.2d at 1160.

Almost every reason which makes the probation officer's counsel unsuitable also operates to disqualify the usual parent as an effective substitute for an attorney. The Court of Appeals properly concluded that, "On this basis, we see no grounds upon which to distinguish the request in this case from the one at issue in Fare." Riley, supra, 653 F.2d at 1160. As in Fare, the person whose presence was requested, petitioner's father, was not trained in the law or as an advocate and could not be expected to know when the police might have exceeded the bounds of proper interrogation. Id., 653 F.2d at 1159[4]. Also, there is no privilege comparable to that which shields a client's communications to his attorney that would have protected Riley's communications to his father. Id., 653 F.2d at 1160. Only the last-mentioned factor, that probation officer is an employee of the State, is a truly distinguishing fact. 442 U.S. at 720.

Although ruling only on the question of the effect of the request for a juvenile officer, the Fare opinion is not without clear intimations as to how a majority of this Court might consider requests for the assistance of other nonlawyers. In particular, the opinion points out that "the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of [an accused] in his dealings with the police and the courts." 442 U.S. at 719 [emphasis added]. Furthermore, it is this "pivotal role of legal counsel" which is said to justify Miranda's substitution of a per se rule for decades of Fifth Amendment jurisprudence. 442 U.S. at 72?. Finally, in discussing whether Michael C. had invoked his right to remain silent, this Court specifically drew the analogy between probation officer and parent, endorsed the totality of circumstances test, and clearly implied that the right may be validly waived despite a request for juvenile officer or parent:

> "Where the age and experience of a juvenile indicate that his request for his probation officer or his parents is, in fact, an invocation of his right to remain silent, the totality approach will allow the court the necessary flexibility to take this into account in making a waiver determination." Fare, supra, 442 U.S. at 725 [emphasis added].

The structure of this one sentence indicates beyond question that the Court foresaw two different situations: those where "the age and experience of a juvenile indicate that his request for his probation officer or his parents is, in fact, an invocation of his right to remain silent" and those where the age and experience indicate that the request is not an invocation of the right. 422 U.S. at 725. If only the first situation were possible, then the entire introductory clause of this sentence would be superfluous. The petitioner's claim under Point I is in essence, that every request for the parents is an invocation of the right, and there can be no second situation.

The petitioner of course wants to render irrelevant the considerations of age and experience of the juvenile.

At the time of his arrest he was only eight days away from his seventeenth birthday, and he was no longer living at the parental home but had lived independently of his parents for at least six weeks prior. Riley, supra, 653 F.2d at 1156, 1161. These are extremely relevant facts which go a long way toward establishing what four prior courts have found: petitioner's request for his father was not, in fact, an invocation of his right to remain silent or a request for counsel.

The relationship of parent to child is extremely complex and only vaguely analogous to the attorney-client relationship. Petitioner vastly simplifies the often conflicting interests of parent and child when he advances the "axiomatic" proposition that "the exclusive interest of concerned parents is the welfare of their children." (Petition at 13) There are numerous reported cases in which the efforts of parents during a juvenile's custodial interrogation are shown to have been antagonistic to the best interests of the child. See, e.g. Little v. Arkansas, 435 U.S. 957, 98 S.Ct. 1590, 55 L.Ed.2d 809 (1978).

Petitioner attempts to escape the effect of Fare by claiming a conflict between that opinion and this Court's decision in California v. Prysock, 29 Cr.L 4110 (1981) (Petition at 11) That case does not advance his argument in any conceivable manner. Despite petitioner's claim, this Court in Prysock did not recognize "the value of parental presence during police interrogation" (Petition at 11). There is no mention whatsoever in either the Per Curiam opinion or dissent filed in Prysock of any importance attached to parental presence, much less can this subject be said to be ruled by that opinion. The issue in that case involved the degree of fidelity to the original Miranda warnings which is required to satisfy constitutional requirements. Moreover, the petitioner is not content simply to misrepresent this Court's holding in conclusory terms, he offers implied paraphrases of this Court's holding which are actually nothing more than the complete fabrications of counsel. Consider the following passage:

> "In Prysock this Court recognized the value of parental presence during police interrogation. One useful role parents can serve is to assure the child's understanding of his right to appointed or retained counsel. They can further advise the child whether or not they intend to hire an attorney for the child. If they do not intend to engage counsel, they can clarify the child's understanding of his constitutional right to have counsel appointed before police questioning. 29 Cr L 4110, 4111 (1981)" (Petition at 11).

Not one of these propositions is discussed or in any fashion alluded to in Prysock. The petitioner's citation to that case is in this instance misleading.

There is no conflict between Fare and Prysock for the elementary reason that the two cases decide different issues.

The facts of the present case do not truly present any question of law the resolution of which cannot be confidently determined by reference to the Fare case and other relevant precedents. The Court of Appeals had no difficulty in finding the appropriate rule, and the opinion below is an extremely well-reasoned application of that rule to facts which though different from Fare do not differ in a constitutionally significant way.

STATE DECISIONS ON THE RIGHT TO PARENTAL COUNSEL

The respondent knows of no debate over the question of whether a state can "constitutionally permit" parental consultation and is willing to concede that a state may statutorily permit such consultation at any time. The real issue in this case, and in other cases cited below, is whether the States are constitutionally required to allow a juvenile to consult with his parents before custodial interrogation can commence. This issue has been considered by many courts and, despite petitioner's citation of nine jurisdictions, respondent submits that only one jurisdiction, Indiana, currently holds, as a matter of constitutional principle, that parental consultation is required.

Moreover, if one seeks a trend in this area, it must be seen that the "growing number of states" are those that hold that there is no constitutional requirement of parental consultation. At least three states, Georgia, Texas, and Arizona, have within the past decade abandoned previous rules requiring parental consultation. Georgia: Riley v. State, 226 S.E.2d 922, 926 (Ga. 1976) overruling Freeman v. Wilcox, 167 S.E.2d 163 (Ga. 1969); Texas: V.T.C.A., Family Cody § 51.09; Arizona: State v. Hardy, 107 Ariz. 583, 491 P.2d 17, (1971), overruling State v. Maloney, 102 Ariz. 495, 433 P.2d 625 (1971). The Texas statutory history is characteristic of a number of states which have recently constricted an originally broad statutory right to parental counsel. See, e.g. Colo. Stat. 22-2-2(3)(c) as amended by L.1971, p. 286 § 3 and Colo. Stat. 19-2-102(3)(c)(I) as amended by L. 1977, p. 237 § 11 (Stat. 19-2-102(3)(c)(I)). After first requiring four prerequisites (1. waiver by both child and attorney; 2. both are informed and understand the right and the consequences of waiver; 3. voluntariness; and 4. waiver in writing) to the valid waiver of a juvenile's rights when originally adopted in 1973, the Texas statute was amended only two years later to allow the admission of a confession "[n]otwithstanding any of the provisions" of the prior law where the State can show that the confession was voluntarily given after defendant received the Miranda warnings. V.T.C.A., Family Cody § 51.09.

Petitioner cites cases from nine jurisdictions in support of his argument that parental consultation is constitutionally required. Respondent submits that at least seven of those jurisdictions do not presently subscribe to that position.

New Jersey: The ruling of In re Carlo, 225 A.2d 110 (1966) which is necessary to the result in that case is that the confession of the defendant therein was not voluntary. Id., at 120[13]. The New Jersey Supreme Court never truly reached the issue of whether, apart from considerations of voluntariness, the confession had to be excluded because of the absence of parental consultation. Five separate reasons are given

for the Court's conclusion that the confession was not voluntary, and the failure to notify the parents, a statutory violation in New Jersey, was cited fifth. It was only after first noting that there were inconsistencies in the defendant's statements, that the defendants were of exceptionally tender age (13 and 15), that the confessions followed "protracted periods of persistent questioning" (6 1/2 hours at two different police stations), and that the environment of the police station was "oppressive" that the Court mentioned the additional factor that the police had failed to permit the parents access to their sons. Id., at 117-119. Also, several New Jersey statutes relating to juvenile detentions were violated by the police, including N.J.S. 2A: 4-33 (since repealed) which provided that no child under 16 be placed in a police station, and N.J.S. 2A: 85-4 which deemed anyone under 16 incapable of committing a crime. The respondent submits that there is no reason to believe that the Seventh Circuit and the Illinois courts would not have reached precisely the same result as the New Jersey Supreme Court in Carlo. Each court would consider all of the relevant factors affecting voluntariness and would arrive at a decision dictated by the evidence considered as a whole and not by an absolute rule of exclusion.

A number of subsequent New Jersey cases have distinguished Carlo and have failed to derive any absolute rule of exclusion from its holding. See State v. R.W., 115 N.J. Super 286, 279 A.2d 709, 714 [1][2] (1971) (twelve-year-old defendant), affd., 61 N.J. 118, 293 A.2d 186 (1972); State in the Interest of J.H., 61 N.J. 108, 293 A.2d 181, 184-185 (1972) (ten-year-old defendant); State in the Interest of A.B.M., 125 N.J. Super. 162, 309 A.2d 619, 622 (1973), affd., 63 N.J. 531, 309 A.2d 617 (1973).

Georgia: As noted above, petitioner's reliance on the decision of the Georgia Court of Appeals in Freeman v. Wilcox, 167 S.E.2d 163 (1969) is misplaced as that case has been overruled, on this issue, by the Georgia Supreme Court in the case of Riley v. State, 226 S.E.2d 922, 926 (Ga. 1976). "To the extent Freeman v. Wilcox, supra, can be read to require an automatic exclusion if the parent is not separately advised

[of the right to counsel], it is disapproved." Riley, supra, 226 S.E.2d at 922.

Massachusetts: Petitioner's authority from Massachusetts, Commonwealth v. Cain, 279 N.E.2d 706 (Mass. 1972), may be shown to be irrelevant from a simple reading of the opinion. Although the conviction in that case was reversed, this was expressly due to the State's failure to show that the defendant had made a knowing and intelligent waiver of his rights. Cain, supra, 279 N.E.2d at 709. The issue for which petitioner cites this case was specifically not decided by the Massachusetts court:

> "Inasmuch as the totality of circumstances in this case is insufficient to show a knowing and intelligent waiver, we need not consider the defendant's further contention that a boy of fifteen years can never waive his right to counsel in the absence of his father, mother, or someone in loco parentis." Cain, supra, at 710.

The Cain case should only be considered authority for those issues upon which it actually ruled.

Maryland: The cited case of Walker v. State, 12 Md. App. 684, 280 A.2d 260 (1971), is another instance of the state court not actually reaching the issue which the petitioner advances. As in Carlo (N.J.), and in Cain (Mass.), the Maryland Court of Appeals based its decision to reverse upon its determination that the State had failed to meet its burden of proving a knowing and voluntary waiver of rights. Indeed, the defendant in Walker did not even receive his Miranda warnings in the first place and his confession was thus, without more, presumptively invalid. Walker, supra, 180 A.2d at 266, 274[12].

Louisiana: The respondent admits that in Louisiana a confession of a juvenile will not be admitted in court where there has been no opportunity for parental consultation prior to the confession, but contends that this result is mandated in that jurisdiction by State in the Interest of Dino, 359 So.2d 586 (La. 1978) which derives this rule from Article I, Sec. 13 of the Louisiana Constitution and certain Louisiana juvenile statutes, not from any federal constitutional precedent. Furthermore, it should be noted that Louisiana is a jurisdiction which requires notification of parents immediately upon

the apprehension of juveniles suspected of crimes. Rev. Stat. La. 13:1577, subd. c.

California: California also does not recognize a general right to parental consultation, People v. Lara, 67 Cal.2d 365, 62 Cal. Rptr. 586, 432 P.2d 202(1967), In re Anthony J., 107 Cal. App. 3d 962, 166 Cal. Rpt. 238, 245[11] (1st Dist. 1980), although a confession will not be admitted where a parental request to see the juvenile defendant was not honored. People v. Level, 172 Cal. Rptr. 904 (Cal. App. 2d Dist. 1981). Absent such request, it is clear that there is no obligation on the State to delay interrogation pending parental presence.

The California case upon which the petitioner relies clearly does not support his position, because the decision in that case, In re Patrick W., 104 Cal.App.3d 615, 163 Cal. Rptr. 848 (1980), did not turn upon the absence of defendant's parents but upon the question of whether the defendant had actually waived his right to an attorney:

> "In Patrick W., however, a 13-year old had expressed reservations about whether he wished to have an attorney, based on uncertainty which he indicated would be resolved only by speaking with his parents. His confession obtained without any attempt by authorities to permit such consultation was thus held invalid." People v. Davis, 110 Cal. App. 3d 151, 167 Cal. Rptr. 783, 787 (2nd Dist. 1980).

Since the request for parents in Patrick W. was directly related to the exercise of the right to counsel, that case is sharply distinguished from the present case in which the District Court has found that petitioner's request for his parents was not for the purpose of seeking counsel. (Appendix B at 7-8).

The California cases which do recognize a limited right to parental consultation can also be explained by the California statutory requirement that a waiver of counsel must be joined in by both the juvenile defendant and the parents. In re Anthony J., supra, 167 Cal. Rptr. at 246, n. 8. However, even with this positive statutory expression of the right which the present petitioner claims, the California courts will still admit a confession obtained in violation of the statute where

voluntariness is established through consideration of the defendant's age plus "such other circumstances as his intelligence, education, experience, and ability to comprehend the meaning and effect of his statement." People v. Lara, supra, 432 P.2d at 599, In re Anthony J., supra, 166 Cal. Rptr. at 246.

Furthermore, it should be noted that the California case of People v. Burton, 6 Cal.3d 375, 491 P.2d 793 (1971), which Justice Marshall cited in his dissent from this Court's first denial of petitioner's petition for writ of certiorari, "has been rendered of doubtful validity by reason of the United States Supreme Court decision of Fare v. Michael C." People v. Level, 172 Cal. Rptr. 904, 913, n.8 (2nd Dist. 1981). Cf. Riley v. Illinois, 435 U.S. 1000, 98 S.Ct. 1657, 56 L.Ed.2d 91, 92 (1978) and Riley, supra, 653 F.2d at 1161.

Pennsylvania: Not only has the absolute rule which petitioner advances been "emphatically reject[ed]" in Pennsylvania, Commonwealth v. Moses, 446 Pa. 350, 287 A.2d 131, 133[1] (1971), but the very case which petitioner cites is careful to note that its holding is based strictly on considerations of voluntariness and does not import any absolute rule:

> "We hold only that when a parent specifically refuses to consent, the Commonwealth has a heavy burden to meet in establishing that the juvenile's waiver was a knowing and voluntary one." Commonwealth v. Roane, 459 Pa. 389, 329 A.2d 286, 288 [1] (1974).

Despite some intimations to the contrary, the Moses case remains controlling law in Pennsylvania, and its rejection of a rule such as the present petitioner proposes could not be more clearly expressed:

> "[I]t is argued that a 'juvenile lacks the ability' to fully understand and assert his constitutional rights and, hence, cannot effectively waive such rights without the advice of a more mature person. We emphatically reject such a prophylactic rule, particularly where a sixteen-year or seventeen-year old is concerned. . .[T]o declare as a matter of law that a sixteen-year old, regardless of maturity and intelligence, is unable to fully understand when he is informed of his constitutional rights and may not by himself waive his right to counsel before being questioned by the police would be to ignore reality and the sophistication of the average sixteen-year old in these days and times." Commonwealth v. Moses, supra, 287 A.2d at 133[1].

Moses has been subsequently reaffirmed in the cases of

Commonwealth v. Porter, 449 Pa. 153, 295 A.2d 311, 313 (1972), Commonwealth v. Davis, 455 Pa. 142, 314 A.2d 313, 315 (1973), and Commonwealth v. Thomas, 392 A.2d 820, 822 (Pa. Super. 1978).

Summary: As detailed above, the respondent concedes only that an absolute rule requiring the provision of parental consultation as a prerequisite to a valid waiver of the right to counsel exists as a matter of constitutional right in the State of Indiana and as a result of statutory enactment in the States of Colorado, Louisiana, and, where specifically requested, in California.[1]

In addition to the states listed above which have specifically declined to adopt the rule advanced by the present petitioner (i.e., Pennsylvania, Massachusetts, Maryland, and New Jersey), and the states which have once adopted but since abandoned the rule (Texas, Arizona, and Georgia), the respondent would observe that the vast majority of states and federal districts have always decided questions of waiver of Fifth Amendment rights on the ground of voluntariness with parental counsel being only one factor in the totality of the circumstances. The following cases illustrate the rule in those jurisdictions:

Arkansas: Shipman v. State, 261 Ark. 559, 550 S.W.2d 424, 248 (1977).

Connecticut: State v. Oliver, 160 Conn. 85, 273 A.2d 867, cert den.402 U.S. 946 (1971).

Florida: State v. Francois, 197 So.2d 492, 494 (Fla. 1967).

Illinois: People v. Pierre, 114 Ill. App.2d 283, 252 N.E.2d 706, 714 (1969), cert. den. 400 U.S. 854.

Iowa: Interest of Thompson, 241 N.W.2d 2, 6 (Ia. 1976).

Kansas: State v. Young, 220 Kan. 541, 552 P.2d 905, 910-911 (1976).

Kentucky: Hayden v. Commonwealth, 563 S.W.2d 720, 722[4] (Ky. 1978).

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[1] Although not cited by petitioner, the states of Alabama and Oklahoma also appear to have statutes creating a right to parental counsel. ALA. CODE § 12-15-67; OKLA. STAT. tit. 10, § 1109(a) (West Supp. 1979).

Minnesota: State v. Hogan, 297 Minn. 430, 440, 212 N.W.2d 664, 471 (1973)

Nebraska: State v. Stewart, 197 Neb. 497, 250 N.W. 2d 849 (1977)

Nevada: Marvin v. State, 95 Nev. 846, 603 P.2d 1056, 1058, n. 4 (1979).

New York: People v. Stephen, J.B., 23 N.Y. 611, 298 N.Y.S. 489, 246 N.E.2d 322, 348-349 (1969).

North Carolina: State v. Dawson, 278 N.C. 351, 180 S.E.2d 140 (1971).

Ohio: State v. Carder, 3 Ohio App.2d 381, 210 N.E.2d 714, 719 (1965).

Oregon: State v. Raiford, 7 Or. App. 202, 490 P.2d 206 (1971).

Tennessee: Braziel v. State, 529 S.W.2d 501, 506 (Tenn. Ct. CR. App. 1975).

Texas: In re Garcia: 443 S.W.2d 594, 598 (Tex. Cr.App. 1969).

Utah: State v. Hunt, 607 P.2d 297 (Utah 1980).

Virginia: Harris v. Commonwealth, 232 S.E.2d 751, 754 (Va. 1977).

Washington: State v. Prater, 77 Wash. 526, 463 P.2d 620, 644 (1970).

Wisconsin: Theriault v. State, 66 Wis.2d 33, 223 N.W.2d 850, 854 (1974).

Wyoming: Mullin v. State, 505 P.2d 305, 309 (1973) cert. den. 414 U.S. 940.

Respondent does not claim that each of the above-cited cases rules the precise issue involved in the present petition, whether the request for a parent is tantamount to a request for counsel, only that those jurisdictions have expressly declined to adopt a constitutional rule which would require parental consultation as a prerequisite to valid custodial interrogation.

The New York case of People v. Stephen, J.B., supra, is typical of this line of cases, and its holding offers a good summary of the current view of most states on this issue:

> "We cannot accept the suggestion that every minor is as a matter of law incompetent to waive his constitutional rights to remain silent and to an attorney unless the waiver is consented to by a parent or guardian who has himself been advised of the minor's rights. . . [W]hether a minor knowingly and intelligently waived these rights is a question of fact and a mere failure of the police to seek the additional consent of an adult will not outweigh, in any given instance, an evidentially supported finding that such a waiver was actually made." People v. Stephen, J.B., supra, 246 N.E.2d at 348-349, citing, i.a., People v. Lara, supra.

The current petitioner has offered no compelling reason why this present practice of the states, which gives full consideration to the true circumstances of each case and to the situation of each defendant, should be unilaterally overturned by this Court and replaced by an arbitrary presumption of constitutional violation.

II

WHEN CONSIDERATION IS GIVEN TO THE TOTALITY OF THE CIRCUMSTANCES, THE PETITIONER'S CONFESSION AND HIS WAIVER OF RIGHTS MUST BE SEEN AS VOLUNTARILY GIVEN AS DETERMINED BY THE COURT OF APPEALS AND EVERY OTHER COURT WHICH HAS CONSIDERED THIS CLAIM.

Although the petitioner asserts that both his confession and his waiver of rights were involuntarily extracted from him as evidenced by the totality of the circumstances attending his arrest and custodial interrogation, petitioner also questions the "totality of the circumstances" approach and urges this Court to "reexamine the efficacy" of that test. (Petition at 15) Respondent submits that the "totality of the circumstances" test remains the most valid and constitutionally desirable method of evaluating the voluntariness of juvenile confessions and is preferable to any proposed absolute (i.e. "per se") or other arbitrary rule.

This Court has consistently applied the totality of circumstances test, Haley v. Ohio, 332 U.S. 596 (1948), Gallegos v. Colorado, 370 U.S. 49 (1962), and has reaffirmed its validity in Fare v. Michael C., 442 U.S. 707, 725 (1979). A recent article which examines in depth the merits of the current approach versus the alternative absolute rule endorses the continued application of the totality of the circumstances test. See Krastek, "The Judicial Response to Juvenile Confessions: An Examination of the Per Se Rule," 17 Duquesne Law Review 659, 685-686 (1980).

Considering petitioner's confession in light of the totality of the circumstances, the respondent submits that all four prior courts which have determined the confession to have been voluntarily given were correct in their evaluation of the evidence. See People v. Riley, 49 Ill. App.3d 304, 364 N.E.2d 306 (1977); United States ex rel. Riley v. Franzen, 653 F.2d 1153 (7th Cir. 1981). The petitioner was almost seventeen at the time of his arrest, Riley, supra, 653 F.2d at 1163, and he was detained for only two hours before confessing. Id., at 1163.

He was orally advised of his right to an attorney and of his right to remain silent. Id., at 1163. There is no evidence of any mistreatment or of physical or psychological coercion, and petitioner actually was acquainted with one of his interrogators. Id., at 1163. Although petitioner may have been discomfited by the removal of his outer clothes, this was necessary in order to test for evidence, and the petitioner was provided with a blanket, while the room was not uncomfortably cool. Riley, supra, at 1163.

The factors which petitioner claims establish the involuntary character of his confession are summarized in the following argument:

> "Where the Court of Appeals and the District Court factually determined that Thomas Riley had requested to see his father but was not permitted to do so until after he had confessed, and where the Court of Appeals and the District Court found so many relevant factors which substantiate Thomas Riley's claim that his confession was wrung from him by unconstitutional means, it follows that the . . . .confession and waiver of rights are not legally sufficient to withstand the totality of the circumstances scrutiny. Under such circumstances the confession must be suppressed." (Petition at 15-16)

The sole authorities cited for this proposition are the dissenting opinion of Justice Powell in Fare v. Michael C., 442 U.S. 707, 732-734 (1979) and an opinion of the Arizona Court of Appeals: State v. Brooks, 127 Ariz. 130, 618 P.2d 624 (1980). Brooks does not advance petitioner's argument at all, since the defendant's confession was admitted in that case and his conviction affirmed despite a clearly more oppressive factual background. Brooks, supra, 618 P.2d at 628 [defendant stripped and thrown in cell clad only in his underwear].

Petitioner's second point simply seeks to relitigate a question of the application of Fifth Amendment law to the facts of his case. Four prior courts have failed to find his waiver of Fifth Amendment rights to have been involuntary or unknowing. The lengthy opinion of the Court of Appeals, 653 F.2d 1153, evidences a particularly searching examination of both state and federal records, and its findings and resolution of this issue are not shown to have been erroneous in any way by the present petition.

III

THE PRESENT PETITION SHOULD BE DENIED BECAUSE IT RAISES, ON A SUBSTANTIALLY SIMILAR RECORD, ISSUES IDENTICAL TO THOSE RAISED BY THIS PETITIONER IN HIS FIRST APPLICATION TO THIS COURT. THE DENIAL OF THAT PETITION SHOULD BE GIVEN A LIMITED PRECEDENTIAL EFFECT WITH THE RESULT THAT CERTIORARI, IN THIS ONE PARTICULAR CASE, SHOULD NOT BE GRANTED.

The present petitioner seeks review by this Court of his 1975 convictions for murder and manslaughter. The grounds for review involve precisely those issues which were litigated at every stage of this case and which formed the basis for petitioner's 1978 petition for writ of certiorari. 435 U.S. 1000 (1978). Riley, supra, 653 F.2d at 1159, n.15. Although the present petition seeks certification of a slightly enhanced record which includes the District Court's evidentiary hearing, the identical issue of law is again advanced on functionally identical facts, and every reason, albeit unexpressed, which led this Court to deny certiorari in the first place should mandate that certiorari be again denied.

The respondent is fully aware of the several precedents which hold that a denial of certiorari means nothing as well as those which hold that it means nothing much. That a contrary view is possible with regard to habeas corpus cases is best illustrated by Justice Jackson's dismissal of the first position as "untenable" and the second as "unintelligible". Brown v. Allen, 344 U.S. U.S. 443, 542, 73 S.Ct. 397, 428 (1953) per Jackson, J., dissenting.

Justice Jackson writing in 1953 highlights, as a reason for abandoning the traditional view, the later custom of this Court of noting dissents from denials of certiorari. "Lawyers and judges will not readily believe that Justices of this Court are taking the trouble to signal a meaningless division of opinion about a meaningless act." 344 U.S. at 543. This factor is particularly relevant in the present case where the dissents of Justices Marshall and Brennan were noted in the earlier denial and a substantial opinion in dissent was filed by Justice Marshall. 435 U.S. 1000. The reasons which Justice Marshall advanced for the grant of certiorari are

precisely those reasons now presented again to this Court in the guise of a new petition for certiorari, and a very extensive congruity of authority relied on will also be noted. Since Justice Marshall so thoroughly championed the present petition's central tenets in his dissent, it simply cannot logically be claimed that the other judges of the Court were not aware of these issues. Although their votes to deny certiorari may of course have been motivated by other considerations, those reasons for denial must be thought still to pertain to this petition in the very same case.

Petitioner's entire constitutional argument is based upon the fact that he requested to see his father and this request was not granted. This fact is fully proved by the prior record as well as by the present one. If that fact alone entitled the petitioner to Constitutional relief then surely this Court would have recognized the same on its first consideration of the issue:

> "If a state is really obtaining conviction by laws or procedures which violate the Federal Constitution, it is always a serious wrong, not only to a particular convict, but to federal law. It is not probable that six Justices would pass up a case which intelligibly presented this situation." Brown v. Allen, supra, 344 U.S. at 544, per Jackson, J., dissenting [emphasis added].

Actually, the earlier record in this case was, if anything, stronger in petitioner's favor as the Illinois Appellate Court reached its decision in light of unresolved conflicting testimony as to whether petitioner's father had in fact requested to see his son, Riley, supra, 364 N.E.2d at 308, while the Court of Appeals decision is based upon an affirmative finding that the father "had indicated that he did not wish to see his sons." Riley, supra, 653 F.2d at 1162, n.19.

To again quote Justice Jackson on what should be the effect of a denial of certiorari:

> "It creates no precedent and approves no statement of principle entitled to weight in any other case. But, for the case in which certiorari is denied, its minimum meaning is that this Court allows the judgment below to stand with whatever consequences it may have upon the litigants involved under the doctrine of res judicata as applied either by state or federal courts." Brown v. Allen, supra, 344 U.S. at 543, Jackson, J., dissenting.

Although the opinion of Justice Jackson represents only his view on this issue, the case of Brown v. Allen appears to be the last case in which this Court has discussed this issue in any detail, and the present rule of no precedential effect was approved in Brown by only a five to four majority. The issue is ripe for reconsideration, particularly due to the now more widespread practice of filing dissenting opinions in certiorari denials. Moreover, a recent opinion of this Court has indicated that the former rule may be relaxed in cases wherein a dissent is filed by noting that the strong dissents of certain judges and failure of others to join in dissent "surely are not without some significance as to their and the Court's attitude . . ." United States v. Kras, 409 U.S. 434, 443, 93 S.Ct. 631, 637 (1973). Should this Court decide to grant this present petitioner's Petition for Writ of Certiorari, respondent asks that it also consider the question of whether review is limited by the prior denial of certiorari or whether certiorari has been improvidently granted because of the prior denial. "[C]all it res judicata or what one will, courts ought not to be obliged to allow a convict to litigate again and again exactly the same question on the same evidence." Brown v. Allen, supra, Jackson, J. dissenting, 344 U.S. at 544.

CONCLUSION

For the foregoing reasons, respondent prays that the petition for Writ of Certiorari be denied.

Respectfully submitted,

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81-5324

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COUNTY OF COOK)
) SS
STATE OF ILLINOIS)

AFFIDAVIT

Darrell Panethiere, being first duly sworn on oath, deposes and states as follows:

1. That your affiant is an Assistant Attorney General assigned to the Criminal Justice Division of the Office of the Attorney General of Illinois.

2. That in his capacity as an Assistant Attorney General your affiant was assigned the preparation of the Respondents' Brief in Opposition in the case of Riley v. Franzen, Docket No. 81-5324.

3. That your affiant is a member of the bar of this Court having been admitted on September 18, 1981.

4. That to your affiant's knowledge fifteen (15) copies of the Brief in Opposition in the above-entitled case were mailed to the Clerk of this Court on September 29, 1981, having been deposited at the United States post office located at 164 North Clinton Street, Chicago, Illinois 60606, with first-class postage prepaid.

FURTHER AFFIANT SAYETH NOT.

Darrell Panethiere
Darrell Panethiere

SUBSCRIBED AND SWORN TO
Before me this 29th day
of September, 1981.

Carole E. Stanley
NOTARY PUBLIC

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OCTOBER TERM, 1981

No. 81-5324

UNITED STATES OF AMERICA ex rel. THOMAS RILEY,

Petitioner,

vs.

GAYLE FRANZEN, Director, Illinois Department of Corrections, and LOU V. BREWER, Warden, Stateville Correctional Center,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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10

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I.

BY REQUESTING TO SPEAK TO HIS FATHER DURING CUSTODIAL INTERROGATION, AS A MEANS OF OBTAINING THE SERVICES OF AN ATTORNEY, THOMAS RILEY, A 16 YEAR OLD JUVENILE, INVOKED HIS RIGHT TO COUNSEL AND SILENCE UNDER THE FIFTH AMENDMENT. THE BLATANT REFUSAL BY THE POLICE TO PERMIT THOMAS RILEY TO SPEAK TO HIS FATHER WHO WAS PRESENT IN THE POLICE STATION VITIATES HIS CONFESSION.

Respondents' arguments to the contrary notwithstanding, Fare v. Michael C., 442 U.S. 707 (1979), has not foreclosed petitioner's claim. (See petition, pp. 8-14). The issue is ripe for review because this area of the law is unsettled. For example, in Prysock v. California, ____ U.S. ____, 29 Cr. L. 4110 (1981), a per curiam opinion of the Court reflects the attitude of the Court that parental presence during a custodial interrogation of a juvenile does serve a useful purpose. Randall Prysock, a minor, had been arrested for murder. The police advised him of his constitutional rights and then notified his parents of his arrest. They arrived at the Sheriff's office and spoke to their son. In their presence, Randall was again advised of his rights. At one point Mrs. Prysock interrupted the officer to clarify her understanding of her son's right to counsel: "According to Sgt. Byrd, Mrs. Prysock asked if respondent could still have an attorney at a later time if he gave a statement now without one." Prysock, 29 Cr. L. at 4111. The officer assured her that Randall "would have an attorney when he went to court and that 'he could have one at this time if he wished one.'" Prysock, 29 Cr. L. at 4111. The officer also ascertained from the parents that they did not intend to hire an attorney for Randall. Prysock, 29 Cr. L. at 4111, footnote 1. It was only after hearing the officer's explanation of his right to counsel and learning from his parents that they did not intend to hire an attorney for him that Randall stated he wished to talk to the police. Prysock, 29 Cr. L. at 4111, footnote 1. See also the views of Justices Stevens, Brennan and Marshall, dissenting. Prysock, 29 Cr. L. at 4112. The import of Prysock is that parental presence serves to clarify a juvenile's understanding of his rights and to inform the juvenile whether or not they as

parents intend to engage an attorney for him. Unlike Randall Prysock, Thomas Riley was prevented by the police from speaking to his father about his rights and of learning what the father intended to do for him. The record is clear that Ernest Riley, Sr., had intended to obtain counsel for his son. (Appendix C to the Petition, page 5, #23). But Thomas did not know it prior to confessing.

Regardless of what the father's intent was in seeking to see Thomas, the focus of the analysis here, contrary to what Respondents urge, is that Thomas asked to see his father. What is important here is Thomas' perception of his rights as manifested by his request to see his father. Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

Thomas wanted to see his father about two matters. First, he wanted his father to secure counsel for him. (Riley, Transcript, page 38, and Abstract, page 48). Secondly he wanted to clarify for himself through his father what his brother had said to him about leniency he would receive as a juvenile for taking the "weight" for himself and his brother. (Riley, Transcript, p. 38,61). He should have had that opportunity.

Respondents are wrong in stating that Thomas was independent of his father. It is true that Thomas was living with his brother. But it was the father who had given Thomas and his brother money to pay for food and rent. (Riley, Transcript, page 43).

Respondents' attempt to minimize the impact of the legal authorities relied on by the petitioner. Their analysis of the law is faulty and adds nothing to their position.

GEORGIA:

In Riley v. State, 237 Ga. 124, 226 S.E.2d 922, 925-926 (1976), the Georgia Supreme Court distinguished Freeman v. Wilcox, 119 Ga. App. 325, 167 S.E.2d 163 (1969) for obvious reasons: the mother was present when the juvenile was admonished of his rights. That the mother was not separately advised of her son's rights is constitutionally sound, and to the extent that Freeman required such an admonition, the Court was correct in disapproving such added procedure. The Georgia court did however follow the criteria established in West v. United States, 399 F.2d 467 (5th Cir.,

1968). Among those factors the Court looked to whether the juvenile was allowed to consult with relatives or friends. West, 399 F.2d at 469.

NEW JERSEY:

State v. R.W., 115 N.J. Super. 286, 279 A.2d 709 (1971), aff'd. per curiam, 61 N.J. 118, 293 A.2d 186 (1972), is easily distinguishable because there the juvenile gave a fictitious name and a false address and the police were not able to reach the parents. R.W., 279 A.2d at 717.

Respondents refer to State in the Interest of S.H., 61 N.J. 108, 293 A.2d 181 (1972). The New Jersey Supreme Court in that case reaffirmed the standards previously articulated in In re Carlo, 48 N.J. 224, 225 A.2d 110 (1966), and determined that the juvenile's confession was involuntary where the police excluded the father during the custodial interrogation in a "cavalier" manner "when his boy most needed him . . ." S.H., 293 A.2d at 185.

State in Interest of A.B.M., 125 N.J. Super. 162, 309 A.2d 619 (1973), supports Riley's position here. There the mother of the juvenile was brought to the interrogation room. She first heard her son's oral admission and permitted her son to give a written statement. She then withdrew her permission, requested an attorney for her son and the interrogation terminated. A.B.M., 309 A.2d at 621.

MASSACHUSETTS:

In Commonwealth v. Cain, 279 N.E.2d 706 (Mass., 1972), the father was denied access to his son. Respondents fail to state what the Court said in its entirety:

> "At least in the present circumstances, we think that this frightened and confused fifteen year old defendant, who was being held in the basement of the police station, should have been permitted the opportunity to consult his father who was upstairs in the station and had requested to see his son. The Miranda warning that the boy had a right to consult a lawyer was hollow indeed when he was denied access to his father who, practically speaking, was the only avenue through which he could effectively evaluate and, if he wished, exercise the right to counsel. (emphasis added) See Gallegos v. Colorado, 370 U.S. 49, 54, 82 S.Ct. 1209, 8 L.Ed.2d 325 (adult advice may be necessary to put juvenile defendant on more equal footing with police); In re State in the Interest of Carlo, 48 N.J. 224, 240-241, 225 A.2d 110 (boys of thirteen and fifteen lack judgment to appreciate harm to themselves by yielding to insistent police questioning). See also Matter of Nelson, 58 Misc.2d 748, 750-751, 296 N.Y.S.2d 472 (Family Ct., Bronx County, N.Y.); Story v. State,

> 452 P.2d 822, 824-825 (Okl.Cr.Ct.App.). Compare Lopez v. United States, 399 F.2d 865, 867 (9th Cir.) (waiver held effective in case involving sixteen year old defendant where mother was present and consented to the interrogation)."

Cain, 279 N.E.2d at 710, footnote 3.

MARYLAND:

Respondents misstate the holding of the Maryland Court of Appeals in Walker v. State, 12 Md. App. 684, 280 A.2d 260 (1971). There the 16 year year old youth was prevented from talking to his mother and other relatives by telephone. The court stated:

> "The major factor, however, though intertwined inexorably with the others, is the fact that this juvenile, regardless of how heinous were the offenses with which he was charged, was held incommunicado until after his confession was obtained."

Walker, 280 A.2d at 273.

The Walker court reached its decision in light of this Court's pronouncements in Haley v. Ohio, 332 U.S. 596 (1948). Walker, 280 A.2d at 273-274.

LOUISIANA:

In In re Dino, 359 So.2d 586 (La., 1978), the Louisiana Supreme Court articulated its standards in light of federal constitutional requirements which were derived from this Court's opinion in Miranda v. Arizona, 384 U.S. 436 (1966), and from its state constitution "whose framers intended to adopt the Miranda edicts full-blown and unfettered." Dino, 359 So.2d at 590.

CALIFORNIA:

Respondents misstate the holding of the California court in In re Patrick W., 104 Cal. App.3d 615, 163 Cal. Rptr. 848 (1980). The court held that grandparents who had sought to speak to the juvenile charged with his father's murder "did not have the official ambivalence that the Supreme Court saw in the Michael C. case. They fall more in the group of which our Supreme Court said, in P. v. Burton (1971) 6 Cal.3d 375, at page 382, 99 Cal. Rptr. 1, at page 5, 491 P.2d 793, at page 797, 'person to whom he [a minor] normally looks' for help." Patrick W., 163 Cal. Rptr. at 849.

PENNSYLVANIA:

Petitioner disagrees with Respondents' analysis of that state's requirements. In reaffirming Commonwealth v. Roane, 459 Pa. 389, 329 A.2d 286 (1974), the Supreme Court of Pennsylvania recently stated:

> "the impediment of [juvenile] immaturity can only be overcome where the record establishes that the youth had access to the advice of an attorney, parent, or other interested adult and that the consulted adult was informed as to the constitutional rights available to the minor and aware of the consequences that might follow the election to be made."

Commonwealth v. Smith, 372 A.2d 797, 800 (Pa., 1977)

SUMMARY:

In reviewing the trend in the development of the law, the Louisiana Supreme Court acknowledged that a majority of the States permit juveniles to waive their rights without the guidance of a friendly adult, however "a growing number of courts and scholars recognize that a more ascertainable assurance of a knowing and intelligent waiver of constitutional rights should precede juvenile interrogation." (citations omitted). State in Interest of Dino, 359 So.2d 586, 593 (La., 1978).

II.

MEASURED BY THE TOTALITY OF THE CIRCUMSTANCES TEST NEITHER THOMAS RILEY'S CONFESSION NOR HIS WAIVER OF RIGHTS IS VOLUNTARY.

Since respondents refuse to discuss the shocking facts of this case, no response is needed.

III.

THE DENIAL OF CERTIORARI WHICH WAS DIRECTED TO THE ILLINOIS APPELLATE COURT ON DIRECT APPEAL SHOULD NOT SERVE TO BAR THIS PETITION WHICH IS DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN HABEAS CORPUS PROCEEDINGS.

Respondents urge the adoption of a new rule which would bar certiorari jurisdiction in habeas corpus litigation. Their argument is without merit and should be rejected as it was by a majority of the Court in Brown v. Allen, 344 U.S. 443, 489-497, 73 S.Ct. 397, 97 L.Ed. 469 (1953) (Opinion of Frankfurter, J.).

In a post Brown memorandum opinion Justice Frankfurter stated:

> "Although the Court has definitely decided that a denial of a petition for certiorari carries no legal significance, Brown v. Allen, 344 U.S. 443, 489-497, 97 L ed 469, 489-510, 73 S Ct 397, the bar, in briefs, and lower courts, in their opinions, continue to note such denials by way of reinforcing the authority of cited lower court decisions. It has therefore seemed to me appropriate from time to time to emphasize through concrete illustrations that a denial of certiorari does not imply approval of the decision for which review is sought or of its supporting opinion."

Elgin, Joliet & Eastern Railway Co. v. Clairon Vern Gibson, 355 U.S. 897, 78 S.Ct. 270, 2 L.Ed.2d 193 (1957).

Respondents further suggest that certiorari jurisdiction should be restricted here because Justice Marshall's prior opinion in this case had advanced petitioner's claim and "it simply cannot logically be claimed that the other judges of the Court were not aware of these issues." (Respondents' Brief, p. 19). This contention also lacks merit.

> "That one of us undertook to write a dissent, even a 'pointed dissent,' from the denial of certiorari should suggest, again, nothing at all about the views of any other Members of the Court on the merits of the petition. Surely each of us has seen many cases in which a colleague's dissent from the denial of certiorari pointed to an issue of great concern that we thought should be decided by this Court, but in which we did not join because we did not consider the case to be an appropriate vehicle for determination of that issue."

United States v. Kras, 409 U.S. 434, 461, footnote 3, 93 S.Ct. 631, 34 L.Ed. 2d 626 (1973) (Marshall, J., dissenting).

CONCLUSION

WHEREFORE, Thomas Riley respectfully requests that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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